Supreme Court, U.S.
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No. 95-706

In The

Supreme Court of the United States

October Term, 1995

THE BABCOCK & WILCOX COMPANY, *et al.*,

v. *Petitioners,*

ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; CARYL VAUGHN GIBBS, INDIVIDUALLY AND ON BEHALF OF CERTAIN UNDERWRITERS OF LLOYDS OF LONDON; INDEMNITY MARINE ASSURANCE COMPANY LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.; INSURANCE COMPANY OF NORTH AMERICA (UK) LTD.; AND C.A. PARR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Contrary to the law of every other Circuit that has addressed this question, may the United States Court of Appeals for the Sixth Circuit adopt a rule permitting the grant of a defendant's motion for summary judgment and dismissal of a plaintiff's case pursuant to Fed. R. Civ. P. 56: (i) merely because the plaintiff has not satisfied the affirmative burden raised by its own summary judgment motion; and (ii) without any prior notice having been given to the plaintiff that the ultimate dispositive issue could serve as the basis for the dismissal?

2. Should this Court address the failure of the Sixth Circuit, as well as that of other Circuit Courts of Appeals, to follow this Court's rule, set forth in *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), requiring that a federal court sitting in diversity jurisdiction and predicting state law in the absence of direct state supreme court precedent give presumptive weight to other relevant decisional law of that state?

PARTIES TO THE PROCEEDING AND AFFILIATIONS

The petitioner is Plaintiff-Appellant, The Babcock & Wilcox Company. Third-Party Defendant-Appellant, McDermott, Inc., and Defendant-Appellant, Creole Insurance Company, Limited, join in this petition. The respondents are listed on the caption of the case.

The Babcock & Wilcox Company is a wholly owned subsidiary of Babcock & Wilcox Investment Company, which is a wholly owned subsidiary of McDermott, Inc., a corporation which has issued publicly traded securities. McDermott, Inc. is a subsidiary of McDermott International, Inc., a publicly owned corporation. Creole Insurance Company Limited is a wholly owned subsidiary of McDermott International, Inc., and an affiliate of McDermott, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Babcock & Wilcox Company ("B&W"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. McDermott, Inc. ("McDermott") and Creole Insurance Company Limited ("Creole") join in this petition.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1-14, is reported at 53 F.3d 762 (6th Cir. 1995). The opinion and order of the district court, App. 15-37, are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 17, 1995. The Petitions For Rehearing and Suggestion For Rehearing En Banc of Plaintiff-Appellant, The Babcock & Wilcox Company, and Third-Party Defendant-Appellant, McDermott, Inc., and Defendant-Appellant Creole Insurance Company Limited were denied on August 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL RULE AND STATUTE INVOLVED

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

28 U.S.C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

1. ***Background***. For over sixty years, B&W has designed, manufactured, installed, delivered and maintained industrial utility and marine boilers throughout the United

States and the world. During most of this period, B&W had a continuous corporate practice and policy of approving or permitting the use of asbestos-containing materials as components in the design, assembly, installation and servicing of its boilers.

Like many other industrial entities whose historical operations or products involved asbestos-containing materials and that did not recognize the associated dangers, B&W is currently facing staggering liabilities from persons claiming injury as a result of exposure to these materials. To date, tens of thousands of asbestos-related personal injury claims have been asserted against B&W, along with numerous other parties alleged to be responsible for the claimants' exposure to asbestos. B&W has incurred hundreds of millions of dollars in asbestos-related liabilities in the form of payments made to the asbestos claimants, with a significant number of unresolved claims still pending against B&W.

In response to the staggering asbestos-related liabilities confronting it, B&W has turned to its historical liability insurers for coverage. Both B&W's primary-layer liability insurers and the great majority of its excess layer insurers, which provided coverage to B&W beginning in 1950, have agreed to pay substantial sums to indemnify B&W for a significant portion of those liabilities. Nevertheless, the Defendant-Respondent insurers, which subscribe to a first-layer excess liability policy providing coverage to B&W for the 1979-80 policy period ("the Subscribers"), have refused to pay any of their policy limits to indemnify B&W.

The Subscribers' 1979-80 policy (the "Subscriber Policy") contains a $2.5 million per-occurrence buffer layer provision. This provision, in effect, provides that the Subscriber Policy will cover, up to its limits, all liabilities arising out of any one "occurrence" taking place during the policy period, to the extent those liabilities exceed a $2.5 million per-occurrence deductible.

The dispute in this case – not one that ordinarily would or should consume the time and resources of this Court – centers around the application of this buffer-layer provision to the large group of asbestos claims at issue. B&W has contended that these asbestos claims arise out of one common, causative "occurrence" and, thus, the amount of liability for all of the claims, when added together, well exceeds the $2.5 million per-occurrence deductible. By contrast, the Subscribers take the position that each of the tens of thousands of asbestos claims arises out of a separate and distinct causative "occurrence" and, therefore, because the value of no one claim exceeds the $2.5 million threshold, no coverage is provided by their Policy.

2. ***Proceedings Below***. On May 22, 1991, B&W filed this action for declaratory judgment and breach of contract against the Subscribers in the United States District Court for the Northern District of Ohio. In a preliminary ruling, the district court held that the law of Ohio applied to this case and, in particular, to the interpretation and application of the Subscriber Policy. App. 67. Following discovery, the parties filed cross-motions for summary judgment on the issue of how many occurrences were represented by the group of asbestos claims against B&W (the "number of occurrences" issue). On August 19, 1993,

the district court entered an opinion and order granting Defendants' motion for summary judgment and dismissing B&W's case.

The district court's opinion never addressed the single issue – the number-of-occurrences issue – that was presented in the parties' cross-motions for summary judgment. Rather, the district court addressed only an analytically distinct issue, *i.e.*, whether the 1979-80 policy period of the Subscriber Policy was "triggered" by the asbestos claims at issue (the so-called "trigger of coverage" issue). The trigger-of-coverage issue had never been presented to the court by Defendants' motion for summary judgment. Nonetheless, the district court granted Defendants' summary judgment on this issue and dismissed B&W's case, without B&W having been afforded the opportunity to present evidence on, and properly brief, the issue. In a word, B&W had been ambushed.

The stated basis for the district court's ruling was that B&W had not satisfied its affirmative burden of proving that the policy period of the Subscriber policy had been triggered. Yet, the district court committed clear error when it ruled, not that B&W's own summary judgment motion would be denied and the case would proceed to trial, *but rather that Defendants' cross-motion for summary judgment would be granted on an issue not presented by that motion*. App. 35. The critical error in this ruling, and the resulting fundamental unfairness to B&W, is patently obvious: B&W's case was dismissed on cross-motions for summary judgment on a dispositive issue that the parties, particularly the Subscribers, never raised in their cross-motions and about which the district court never gave notice to B&W that it could serve as the basis

for dismissing B&W's case. At best, B&W had only been notified that its motion would be denied and the case would proceed to trial if it did not come forward with sufficient evidence on the trigger-of-coverage issue.

In presenting its appeal of the district court's ruling to the United States Court of Appeals for the Sixth Circuit, B&W requested correction of the manifest procedural error in the court's grant of the Subscribers' summary judgment motion and also requested that the Sixth Circuit address the one and only issue that had been presented by the parties' cross-motions for summary judgment but that had not been decided by the district court – the number-of-occurrences issue. The Sixth Circuit chose to do the latter but not the former.

Specifically, the Sixth Circuit acknowledged but rejected B&W's argument that it had not been given prior notice that the trigger-of-coverage issue could be the basis for dismissal of its case. App. 5-6. Nonetheless, in the course of rejecting B&W's argument and upholding the district court's ruling, the Sixth Circuit actually highlighted the validity of B&W's argument. Indeed, after searching thoroughly through the district court record for the document that supposedly placed B&W on notice that Defendants' summary judgment motion would be granted if B&W did not come forward with sufficient evidence on the trigger-of-coverage issue, the Sixth Circuit was able to identify only one document: "Defendants' Reply Memorandum in Opposition to Summary Judgment Motions of B&W and McDermott." App. 5. This document related to Defendants' opposition to *B&W's* motion, not to the *Subscribers'* motion. Thus, the Sixth Circuit opinion, while rejecting B&W's appeal, actually

serves to reinforce B&W's argument that neither the Defendants nor the district court gave B&W any notice that the trigger issue could be the basis for a grant of Defendants' summary judgment motion.

Recognizing the tenuous basis of its decision, the Sixth Circuit provided an alternative, independent basis for rejecting B&W's appeal – namely, the Court decided to address the number-of-occurrences issue that had been presented to the district court but had not been decided. In ruling adversely to B&W on this issue, the Sixth Circuit committed its own glaring error that contravened the directives of prior Supreme Court precedent. Specifically, although the Sixth Circuit was sitting as an *Erie* court with jurisdiction based on diversity of citizenship, the Court did not attempt to predict how the highest court of Ohio would decide the issue as required by this Court's precedents; rather, it decided the issue as a matter of federal common law. App. 9-14.

There were no existing decisions of the Ohio Supreme Court squarely deciding the number-of-occurrences issue. Nonetheless, the Sixth Circuit disregarded the decisions of lower Ohio courts and federal courts applying Ohio law to the number-of-occurrences issue. It also failed to consider the principles of Ohio insurance law that repeatedly have been espoused by the Ohio Supreme Court and that should have been outcome-determinative. Instead, the Sixth Circuit merely considered and adopted decisions on the issue by several out-of-state federal district courts, without ever attempting to determine if the analytical underpinnings of those decisions were consistent with the principles of Ohio insurance law.

Following the Sixth Circuit's issuance of its decision upholding the district court's grant of the Subscribers' summary judgment motion, B&W (as well as McDermott and Creole) filed with that Court Petitions For Rehearing And Suggestion For Rehearing En Banc. On August 4, 1995, the Sixth Circuit denied the petitions without further explanation of its decision. App. 68-69.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's affirmance of the district court's grant of the Subscribers' motion for summary judgment, if left undisturbed, will (i) create a conflict among the Circuits on long-settled principles of summary judgment practice under Fed. R. Civ. P. 56; and (ii) contribute to the federal courts' increasing failure to abide by this Court's prior directives under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), regarding the "proper regard" to be accorded state lower-court decisions. Because this decision has such far-reaching adverse effects, it warrants review by this Court.

1. The Sixth Circuit's Affirmance Of The Grant Of The Subscribers' Motion For Summary Judgment Is A Radical Departure From Precepts Of Summary Judgment Practice That, If Left Uncorrected, Will Create A Conflict Among The Circuits.

The Sixth Circuit's erroneous affirmance of the district court's grant of the Subscribers' motion for summary judgment squarely rejects two fundamental principles of

federal summary judgment practice that have been adopted by this Court as well as the Courts of Appeals for other Circuits.

First, the affirmance is contrary to the rule adopted by other Courts of Appeals that, where cross-motions for summary judgment have been filed, one moving party's failure to establish its entitlement to judgment as a matter of law should not result in a judgment in favor of the cross-movant.[1] The Sixth Circuit's decision is inconsistent with the principle that the filing of cross-motions for summary judgment does not reflect the parties' consent to the resolution of the case on the existing record and does not grant the district court the freedom to treat the case as though it had been submitted for final resolution on a stipulated record.[2]

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[1] *E.g., Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993); *LewRON Television, Inc. v. D.H. Overmyer Leasing Co.*, 401 F.2d 689, 692 (4th Cir. 1968), *cert. denied*, 393 U.S. 1083 (1969); *Mitchell v. McCarty*, 239 F.2d 721, 723 (7th Cir. 1957); *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975); *Houghton v. Foremost Fin. Servs. Corp.*, 724 F.2d 112, 114 (10th Cir. 1983); *Latecoere Int'l, Inc. v. United States, Dep't of Navy*, 19 F.3d 1342, 1366 (11th Cir. 1994); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

[2] *E.g., Boston Five Cents Sav. Bank v. Secretary of Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985) (Breyer, J.); *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968); *John v. Louisiana*, 757 F.2d 698, 705 (5th Cir. 1985); *Wermager v. Cormorant Twp. Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983); *Sherwood v. Washington Post*, 871 F.2d 1144, 1147-48 (D. D.C. 1989). *See* 6 James W. Moore et al., *Moore's Federal Practice* ¶¶ 56.04[1], 56.13 (2d ed. 1994).

In this case, the only issue raised by Subscribers' summary judgment motion seeking dismissal of B&W's case was the number-of-occurrences issue. The district court did not grant the motion based on that issue. Rather the district court granted Subscribers' motion based on a distinct issue – the trigger-of-coverage issue – that at best was mentioned only in the context of B&W's affirmative motion seeking summary judgment in its favor. The Sixth Circuit's decision upholding the district court's dismissal of B&W's case places the Sixth Circuit at odds with each of the other Circuit Courts of Appeals that has considered this procedural issue. Accordingly, if a dismissal by a district court on these same facts had been reviewed in any other such Circuit, the dismissal would have been vacated with directions to the district court to deny each of the parties' cross-motions for summary judgment and to proceed to trial.

Second, assuming *arguendo* that the trigger-of-coverage issue was raised at all by the Subscribers' briefing on cross-motions for summary judgment, then the Sixth Circuit's affirmance of the district court's dismissal rejects the rule adopted by this Court, and followed by every other Circuit Court of Appeals considering the issue, that adequate notice must be provided to a party before the entry of summary judgment against it. *See Fountain v. Filson*, 336 U.S. 681, 683 (1949). In this case, the only arguable notice that was provided to B&W of the potentially dispositive trigger-of-coverage issue was that contained in a *reply* brief entitled "Defendant Subscribers' Reply Memorandum in Opposition to Summary Judgment Motions of Babcock & Wilcox and McDermott." This reply brief, which relates to B&W's affirmative summary

judgment motion, does not satisfy the well-established rule requiring notice to a party prior to the entry of summary judgment against it, a rule that has been embraced by Fed. R. Civ. P. 56 and every other Circuit Court of Appeals that has considered the issue.[3]

By its decision, in this case, the Sixth Circuit has now seemingly established a new and conflicting rule that any statement of an issue, wherever contained in *any* pleading or brief, can constitute notice to a party sufficient to permit entry of summary judgment on that issue. The manifest unfairness of such a rule in this case is highlighted by the fact that, before the hearing on B&W's and Subscribers' respective cross-motions for summary judgment, the district court had ruled expressly that the only pending motions that it would entertain were those dealing with the number-of-occurrences issue. App. 40 (cross-motions deal with "defining a single occurrence under the policy").

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[3] *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("notice" required); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993) ("adequate notice" required); *Trusthouse Forte, Inc. v. 795 Fifth Ave. Corp.*, 756 F.2d 255, 259 (2d Cir. 1985) ("notice" required); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 154 (3d Cir. 1985) ("notice" required), *cert. denied*, 484 U.S. 1043 (1988); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 n.3 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 444-45 (5th Cir. 1991) ("proper notice" required); *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993) ("notice" required); *Hubbard v. Parker*, 994 F.2d 529, 531 (8th Cir. 1993) ("sufficient advance notice" required); *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994) ("notice" required); *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994) ("notice" required); *see Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1164 (Fed. Cir. 1993) ("notice" required).

The new rule embraced by the Sixth Circuit is also squarely in conflict with the majority rule that a party may be subjected to an entry of summary judgment pursuant to an adverse party's motion only upon issues raised in that motion, and not upon issues raised in other contexts or not raised at all. As stated succinctly by the Seventh Circuit, "[w]hen a party moves for summary judgment on ground A, his opponent is not required to respond to ground B – a ground movant might have presented but did not." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (citing *Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988); *John Deere Co. v. American Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987)).[4]

Indeed, in a decision reviewing a district court's procedural error on summary judgment that is directly on point with the one committed by the district court in this case, the Tenth Circuit held that it was "unfair" to affirm the summary judgment against the plaintiff when the defendant-government only raised the issue upon which summary judgment was granted in a brief opposing plaintiff's motion for summary judgment and not in the defendant-government's own affirmative motion for summary judgment. *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994); *see also, e.g., Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986) (reversing grant of

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[4] *Accord Morales Morales v. Rafael Arias*, 856 F.2d 396, 397 (1st Cir. 1988); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994).

summary judgment in favor of defendant when dispositive issues were only raised in plaintiff's earlier briefs in opposition to motion to dismiss).[5]

Accordingly, other Circuit Courts of Appeals that have considered the issue do not permit a district court to grant a party's motion for summary judgment on grounds that are not raised by the moving-party's motion but rather are raised by the moving party in some other procedural context. By contrast, in the Sixth Circuit, a party may be subjected to an adverse summary judgment on an issue without ever having been apprised that it must come forward with evidence creating a triable issue of fact on that issue.

Moreover, if the district court's entry of summary judgment in this case is deemed to have been a judgment entered *sua sponte* rather than one upon Subscribers' motion, then the Sixth Circuit's decision creates a conflict as to the rule adopted by other Circuits that, when summary judgment is entered *sua sponte*, any doubts as to the adequacy of the notice should be resolved in favor of the losing party. This rule has been expressly adopted by both the First and Fifth Circuits. *See Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989); *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992). The foregoing rule is an extension of the principle that *sua sponte* entry of summary judgment should be employed only with great care and circumspection. *E.g., Bonilla v. Nazario*, 843 F.2d

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[5] *See also Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990) (reversing district court's grant of summary judgment pursuant to a motion *in limine*).

34, 37 (1st Cir. 1988) (Breyer, J.) (quoting 10A C. Wright, et al., *Federal Practice & Procedure*, § 2720 at 34 (1983)); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 154 (3d Cir. 1985), *cert. denied*, 484 U.S. 1043 (1988).

Finally, the Sixth Circuit's new rule is also squarely contrary to a central purpose of the Federal Rules of Civil Procedure – to prevent litigation by ambush. *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 253 (1978); *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171-72 (1st Cir. 1995). Accordingly, this Court should grant certiorari to strike down this rule and to restore uniformity in the federal courts as to the requirements for adequate notice to a party prior to the entry of summary judgment against that party.

2. The Sixth Circuit's Decision Is Contrary To Prior Directives Of This Court And Widens The Conflict Among The Circuits On The Issue Whether A Federal *Erie* Court Should Give Presumptive Deference To Relevant Decisional Law On A State-Law Issue In The Absence Of Direct State Supreme Court Precedent.

This Court has characterized its decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Unfortunately, the Sixth Circuit and several other Courts of Appeals are undermining the well-established *Erie* doctrine by the manner in which they purport to ascertain a state's law on an issue in the absence of any direct

state supreme court precedent on the issue. This Court, in *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967), has set forth the procedure to be applied in such a situation. Specifically, this Court has stated:

> If there be no decision by [the State's highest] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Id. at 465. Moreover, as *Bosch* reaffirmed, "proper regard" requires that a federal court predicting state law under *Erie* treat a lower state court decision as " 'a datum for ascertaining state law *which is not to be disregarded . . . unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Id.* (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); final emphasis by the *Bosch* Court).[6]

Notwithstanding this clear direction, the Sixth Circuit's decision in this case implicitly rejects the mandate of *Bosch* and adopts the following *alternative* rule for a federal court ruling on an issue of state law: When there is no direct state supreme court precedent on an issue, the federal court need not give any deference to the decisions of lower courts interpreting the state's law on the relevant issue; nor must it pay any regard to the state's general jurisprudential principles that govern the subject matter of the dispute, even as set forth by the state supreme court. In short, the Sixth Circuit has determined

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[6] *See also Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (quoting with approval *West*, 311 U.S. at 237-38).

that, in the absence of direct state supreme court precedent, a federal court may pick and choose any decisional law from around the nation, regardless of the particular state law that it purports to apply. The nationalization of insurance law may or may not be a laudable goal. Nonetheless, the worthiness of this goal, and the manner in which it is to be achieved, are not matters for the federal courts to decide.

In this case, in supporting its ruling on the number-of-occurrences issue, the Sixth Circuit did not rely upon a single case from an Ohio court or upon a single decision of another court applying Ohio law. The court summarily (and erroneously) distinguished all of the decisions cited by B&W that applied Ohio law to the number-of-occurrences issue, without making any attempt to apply the principles of Ohio insurance law supporting those decisions to the policy language at issue. The court also made no effort to test its ultimate ruling – or the rulings of the non-Ohio cases on which it relied – against the general principles of Ohio insurance law that should govern this case.[7] Instead, the court went through the entire body of national case law "cafeteria-style," supporting its ruling

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[7] Some of the Ohio insurance principles ignored by the Sixth Circuit in ruling on the number-of-occurrences issue are that: (i) ambiguities in policy language are to be construed in favor of the insured, and (ii) any limitations or qualifications on coverage are to be interpreted narrowly and with the presumption that any risk that is not clearly excluded is covered. *See, e.g., Faruque v. Provident Life & Accident Ins. Co.*, 508 N.E.2d 949, 952 (Ohio 1987); *Moorman v. Prudential Ins. Co. of Am.*, 445 N.E.2d 1122, 1124-25 (Ohio 1983); *Buckeye Union Ins. Co. v. Price*, 313 N.E.2d 844, 846 (Ohio 1974).

with three decisions from non-Ohio federal courts – two decisions from the Eastern District of Pennsylvania, and one decision from the Western District of Virginia. *See* App. 10-12.[8]

To have followed *Bosch* and accorded "proper regard" to the Ohio rules of decision in resolving the number-of-occurrences issue in this case, the Sixth Circuit should have (i) considered the one Ohio lower-court decision on the same issue[9] and determined that the analytical underpinning of that decision was squarely applicable in this case; (ii) reviewed federal court decisions applying Ohio law to this issue[10] to understand the Ohio insurance law principles that guided those decisions; (iii) analyzed the general principles of insurance law espoused by the Ohio Supreme Court that were relevant to deciding the

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[8] Compounding its error, the Sixth Circuit misapplied the teachings of the three cases upon which it relied. In each case, the district court was construing policy language that it concluded was ambiguous. *See Norfolk & Western Ry. Co. v. Accident & Casualty Ins. Co.*, 796 F. Supp. 929, 936 (W.D. Va. 1992), *dismissed in relevant part as moot*, 41 F.3d 928 (4th Cir. 1994); *Pittsburgh Corning Corp. v. Travelers Indem. Co.*, No. Civ. A. 84-3985, 1988 WL 5302, at *2 (E.D. Pa. Jan. 21, 1988); *Northern Shipping Co. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 617 F. Supp. 136, 138 (E.D. Pa.), *aff'd*, 774 F.2d 1152 (3d Cir. 1985). As such, under controlling principles of Ohio law, *see supra* n.7, these decisions actually support a ruling in favor of the policyholder.

[9] *See Morton Thiokol, Inc. v. Aetna Casualty & Sur. Co.*, No. A-8603799, slip op. (Ohio Com. Pls. Dec. 28, 1988), *reprinted in* 3 Mealey's Litig. Reps. – Ins. § B (Jan. 11, 1989).

[10] *See International Surplus Lines Ins. Co. v. Certain Underwriters at Lloyd's of London*, 868 F. Supp. 917 (S.D. Ohio 1994); *Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co.*, 597 F. Supp. 1515 (D. D.C. 1984).

number-of-occurrences issue[11]; and (iv) reviewed the caselaw on the issue from around the nation that arises from the same principles of insurance law as those found in decisions of the Ohio Supreme Court, the overwhelming majority of which support B&W's position.[12] All of the foregoing authority was provided to the Sixth Circuit by B&W in its briefs, and all of it was seemingly ignored.

The Sixth Circuit's practice of ignoring the dictates of *Bosch* and disregarding relevant, lower state-court decisional law is not a unique phenomenon among the Courts of Appeals. For example, the Second Circuit has indicated that "proper regard" under *Bosch* may require merely a passing acknowledgement of lower state-court decisions and that such decisions may be of no more value in predicting how the state's highest court would rule on an issue than the federal court's exercise of its own judgment, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190-91

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[11] *See supra* n.7.

[12] *See, e.g., Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502, 505-06 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982); *Michigan Chem. Corp. v. American Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984); *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 432-33 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3599 (1995); *Associated Indem. Corp. v. Dow Chem. Corp.*, 814 F. Supp. 613, 621 (E.D. Mich. 1993); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 773 (E.D. Pa. 1989), *modified*, No. Civ. A. 86-7501, 1989 WL 73656 (E.D. Pa. June 30, 1989), *aff'd in part and vacated and remanded on other grounds*, 25 F.3d 177 (3d Cir. 1994); *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (JSM), 1992 WL 123144, at *13 (S.D.N.Y. May 27, 1992), *appeal pending*.

(2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992), or decisions from other jurisdictions, *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994). Similarly, the Court of Appeals for the Ninth Circuit has evidenced a similar disregard of this Court's direction on the subject,[13] suggesting that lower state court decisions are " 'merely data' " providing "guidance" to a federal court, *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986) (quoting *American Sheet Metal, Inc. v. Em-Kay Eng'g Co.*, 478 F. Supp. 809, 813 (E.D. Cal. 1979)), *modified in part on other grounds*, 810 F.2d 1517 (9th Cir. 1987), and that they are entitled to no more weight than decisions from other jurisdictions, *see State Farm Mut. Auto. Ins. Co. v. Davis*, 937 F.2d 1415, 1418 (9th Cir. 1991); *Dimidowich*, 803 F.2d at 1482. In fact, the Ninth Circuit has gone so far as to state that, ultimately, it need use only its own best judgment in predicting state law. *General Motors Corp. v. Doupnik*, 1 F.3d 862, 865 (9th Cir. 1993); *see Davis*, 937 F.2d at 1418.

By contrast, the Third Circuit has remained faithful to *Bosch's* "proper regard" standard by requiring a federal court to search thoroughly and give preeminence to lower court decisions, "at least in the absence of convincing evidence [that] the state supreme court would not follow them," *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1049 (3d Cir.), *cert. denied*, 114 S. Ct. 440 (1993), and by requiring that the federal court "be sensitive to the

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[13] Indeed, the Ninth Circuit appears to believe, erroneously, that it "is open to some question" whether *Bosch* requires that even decisions of intermediate appellate courts be followed absent other persuasive contrary authority. *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 390 n.2 (9th Cir. 1988). This belief is clearly incorrect. *See Bosch*, 387 U.S. at 465.

doctrinal trends of the state" and "the policies which inform the prior adjudications by the state courts," *Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978), *abrogated on other grounds by Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237 (3d Cir. 1993).

Other Circuit Courts of Appeals, including the First, Fourth, Fifth and Eleventh, have joined the Third Circuit in according proper deference to a state's lower-court decisions and relevant jurisprudential principles in the absence of direct state supreme court precedent. *See, e.g., CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77, 88-89 (1st Cir. 1992); *United States v. Little*, 52 F.3d 495, 498 (4th Cir. 1995); *Sifers v. General Marine Catering Co.*, 892 F.2d 386, 397 & n.46, *modified in part on other grounds*, 897 F.2d 1288 (5th Cir. 1990); *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 820 (11th Cir. 1985); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982).

The conflict and inconsistency among the federal Circuits in the application of the *Bosch* "proper regard" standard has been well-documented and widely criticized. One scholarly commentator, reviewing hundreds of federal appellate opinions in diversity cases, reached the "explicit and disquieting" conclusion that "the *Erie* decision is being frequently ignored or avoided." David A. Thomas, *The Erosion of Erie in the Federal Courts: Is State Law Losing Ground?*, 1977 B.Y.U. L. Rev. 1, 2 (noting that nearly a quarter of all diversity cases in federal courts of appeals may have contained a misapplication or non-application of state law, in contravention of *Erie*). Many other commentators have identified this same problem,

noting time and again the uncertainty surrounding federal courts' determination of state law rules of decision. *See, e.g.*, Geri J. Yonover, *A Kinder, Gentler Erie: Reining In the Use of Certification*, 47 Ark. L. Rev. 305, 307 (1994); Richard D. Freer, *Erie's Mid-Life Crisis*, 63 Tul. L. Rev. 1087, 1089, 1091 (1989); Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DePaul L. Rev. 1, 3-8, 40-42 (1989); Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law: Factors, Etc., Inc. v. Pro Arts, Inc.*, 1982 Duke L.J. 704, 705.[14]

In addition, this Court's own certiorari docket also demonstrates that this problem is a recurring one. Questions about the procedure for ascertaining state law under the *Erie* doctrine have been presented to the Court at least thirty times since 1970.[15]

In short, this Court's prior directive in *Bosch*, setting forth the "proper regard" and presumptive weight to be accorded other relevant state decisional law in the absence of direct state supreme court precedent, is being routinely ignored in several Circuit Courts of Appeals, including the Sixth Circuit. Moreover, even those courts that are purporting to follow *Bosch* are doing so in conflicting and inconsistent manners. As a result, disarray on

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[14] *Cf.* Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 Or. L. Rev. 781, 784 (1992) (reviewing over 900 tax cases and rulings citing *Bosch* and finding "a quarter century of disarray caused by a misreading of the *Erie* underpinnings of the 'proper regard' standard.").

[15] A non-exhaustive list of petitions for certiorari raising questions about lower courts' determinations of state law is set forth in the Appendix. App. 70-72.

this issue among the Circuits has developed over the past quarter-century. This Court should put an end to this cacophonous din.

Frequent misapplications of the *Bosch* rule by federal courts pose a serious threat to fundamental principles of federalism, and risk undermining the entire *Erie* doctrine. As a result of misconstruing the *Bosch* standard, federal courts often are engaging in the type of *ad hoc* decision-making that was prevalent under the *Swift v. Tyson* regime and that the Court in *Erie* so strongly criticized. *Erie*, 304 U.S. at 78 (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). Today, however, instead of invoking "general law" to reach desired results, many federal courts are making "predictions" as to state law that are (explicitly or implicitly) nothing more than a reflection of their own views as to what a state's law ought to be, divorced from the jurisprudential traditions of the particular state. The natural and inevitable outgrowth of such a freestyle judicial inquiry is the "debilitating uncertainty in the planning of everyday affairs," *see Hanna v. Plumer*, 380 U.S. at 474 (Harlan, J., concurring), and the forum-shopping by federal litigants that *Erie* was intended to prevent.

Federal courts' current freedom to fashion *ad hoc* results, under the guise of predicting state law, also is shifting the balance of power struck by *Erie* significantly toward the federal courts and away from the states. Just last Term, this Court reaffirmed the importance of our federalist system of dual sovereignty, limiting Congress's legislative power over purely local matters. *See United States v. Lopez*, 115 S. Ct. 1624 (1995). This Court should now take the opportunity to reaffirm that, under *Erie*,

similar limitations are imposed on the federal judiciary. *See Erie*, 304 U.S. at 78-79.

Accordingly, the Court should grant certiorari on this issue, to reject the type of *ad hoc* predictions of state law that have been sanctioned by the Sixth, Second and Ninth Circuits and to make clear its direction to federal courts that the decisions of lower state courts are presumptively correct, and should be disregarded only when there is "persuasive evidence" that they do not accurately reflect the way in which the state's highest court would decide the question. This Court should also reaffirm that any prediction as to state law – particularly one based on rulings from courts outside the state – must be formulated in the light of, and explicitly evaluated against, that state's relevant jurisprudential principles, whether expressed by lower-court decisions on the issue, other decisions applying that state's law to the issue, or by decisions of the state's highest court on analogous questions on the same subject matter.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BABCOCK & WILCOX COMPANY, *Plaintiff-Appellant/ Cross-Appellee,* *v.* ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO.; ST. PAUL MERCURY INSURANCE CO.; AMERICAN HOME ASSURANCE CO.; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE CO.; INSURANCE CO. OF NORTH AMERICA; CARYL VAUGHN GIBBS, individually and on behalf of certain underwriters of Lloyds of London; INDEMNITY MARINE ASSURANCE CO., LTD.; ENGLISH AND AMERICAN INSURANCE CO., LTD.; INSURANCE CO. OF NORTH AMERICA (UK), LTD.; C.A. PARR, *Defendants-Appellees/ Cross-Appellants,* CREOLE INSURANCE CO., LTD., *Defendant-Appellant/ Cross-Appellee,* MCDERMOTT, INC., *Third-Party Defendant-Appellant/Cross-Appellee.*	) ON APPEAL) from the) United States) District) Court for the) Northern) District of) Ohio

Decided and Filed May 17, 1995

Before: KENNEDY and NORRIS, Circuit Judges; TAYLOR, District Judge.*

KENNEDY, Circuit Judge. Defendants, a group of insurance companies, subscribed to an insurance policy designed to provide excess liability insurance to plaintiff. Plaintiff filed this declaratory judgment action against defendants, seeking a judgment that its lower levels of insurance had been exhausted and that defendants were now liable under the excess insurance policy. The parties filed cross-motions for summary judgment, and the District Court granted summary judgment in favor of defendants. Plaintiff now appeals, and we affirm. Defendants have also filed a cross-appeal, but we find it unnecessary to reach that issue.

I.

The Babcock & Wilcox Company ("Babcock") has manufactured boilers since the nineteenth century. Until 1972, Babcock approved the use of asbestos insulation, as well as various components containing asbestos, in its boilers. In 1972, Babcock ceased approving the use of asbestos insulation, although the use of certain asbestos-containing components continued until the mid 1980's.

* The Honorable Anna Diggs Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

In 1978, J. Ray McDermott & Company ("McDermott") acquired Babcock. Beginning in 1979, McDermott and Babcock jointly purchased excess umbrella liability insurance coverage. McDermott, with the help of its longtime broker Adams & Porter, drafted an insurance policy to satisfy McDermott's needs. After the two parties finalized the language and contents of the policy, Adams & Porter lined up several insurance companies to "subscribe" to the policy. These insurance companies (collectively, the "Subscribers") are defendants in the present action.

The relevant portions of the policy provide as follows:

> 1. *COVERAGE*
>
> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries" as defined herein resulting from an "occurrence" as defined herein.
>
> . . . .
>
> *DEFINITIONS*
>
> . . . .
>
> 4. *OCCURRENCE*
>
> The term "Occurrence," whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking

> place during the term of this contract in respect to all the Assured's operations.

The dispute in the District Court centered around the definition of an "occurrence". This definition is the center of controversy due to the "buffer layer" established in the policy. All parties acknowledge that the Subscribers' policy does not come into play until the damages for each occurrence exceed a specified minimum amount.[1] The dispute, therefore, centers around how many "occurrences" have arisen under the 1979-80 policy.

The policy defines "occurrence", in part, as a "happening" that arises out of an "event." Babcock's primary argument before the District Court was that the relevant "event" is Babcock's decision to use asbestos in its boilers, and the "happening" or "series of happenings" are the injuries suffered by people exposed to the boilers. While the Subscribers do not take issue with Babcock's definition of "happening," they do strenuously argue that the "event" is not the decision to use asbestos-containing components, but rather is each person's exposure to the asbestos components.

The District Court did not resolve the "number of occurrences" issue. Instead, the lower court assumed that Babcock's definition of "event" was correct and focused

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[1] At some points, the parties state that this specified amount is $2 million, while at other times they indicate that the amount is $2.5 million. We need not resolve this dispute. If we find in favor of Babcock, the record clearly indicates they have paid more than $2.5 million. If we find in favor of Subscribers, the record contains no evidence suggesting that the damages for any one "occurrence" (as the Subscribers define it) have amounted to $2 million.

on the last clause of the policy's definition of an "occurrence." That last clause states "arising out of or due to one event taking place during the term of this contract. . . . " After reviewing the record, the District Court concluded that Babcock had not carried its burden of showing that it made any pertinent decision during the term of the policy. Accordingly, the District Court granted summary judgment in favor of the Subscribers. Babcock now appeals.

II.

A. Trigger of Coverage

Babcock strenuously argues that the District Court erred in deciding the trigger of coverage issue, as it was not raised below and was not fully briefed. We disagree. We have reviewed the material submitted to the District Court in relation to the cross-motions for summary judgment, and the Subscribers clearly made this argument to the District Court. The argument was foreshadowed in early pleadings, and it explicitly appeared in the pleading entitled "Defendant Subscribers' Reply Memorandum in Opposition to Summary Judgment Motions of Babcock & Wilcox and McDermott." This pleading was filed with the District Court on March 5, 1993. A review of the lower court's docket sheet shows that Babcock filed at least one other relevant pleading after that date. On March 12, 1993, Babcock filed its "Reply by Plaintiff Babcock & Wilcox Co. in Opposition to Defendants' Cross Motion for Summary Judgment on Occurrence Issue and in Further Support of Plaintiffs' Partial Summary Judgment Motion." Thus, the Subscribers clearly placed the trigger of coverage issue before the District Court, and Babcock

had at least one opportunity to respond to that argument. Accordingly, the District Court did not err in resting its decision on that ground.

Turning to a review of the merits of this issue, we start our examination, as did the District Court, with the assumption that Babcock's definition of "event" is correct – that Babcock's decision to use asbestos in its boilers is the relevant cause of the injuries. Babcock argues that this assumption should essentially end our inquiry, as the Subscribers have conceded that injuries did occur during the policy year. Babcock's argument misses two key points. First, it totally ignores the dispute over what must occur during the policy term – the injuries or the event. Second, it lifts the Subscribers' alleged "concession" completely out of context. As we noted above, both parties agree on the definition of "happening" – the dispute is over the definition of "event." The Subscribers' "concession" was made in conjunction with their contention that the relevant "event" was the exposure to asbestos.

We turn then to what must occur during the policy terms under Babcock's definition of event. The relevant portion of the policy states: "The term 'Occurrence' whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking place during the term of this contract in respect to all the Assured's operations." The dispute revolves around the phrase "taking place during the term of this contract" and whether the phrase modifies "happening" or "event." Babcock argues that the policy requires the "happening or series of happenings" to occur during the policy term, as opposed to the "event."

The District Court correctly rejected this interpretation, and we adopt that portion of his opinion:

> Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term 'event' and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the *event*, not the happening, must occur during the term of the contract.
>
> During the oral argument on the motions, plaintiff argued that "there appears to be a comma missing". . . . With regard to the missing comma theory, the court must confine itself to the content of the document. This court can no more decide this case based on phantom punctuation than it could decide this case based on words and phrases not incorporated in the contract.

At various points in this appeal, Babcock has argued that the terms of the policy are ambiguous, and, therefore, this court should construe the language against the Subscribers. The Subscribers rebut this argument by pointing out that Babcock and its insurance broker selected the terms of the policy. We need not resolve this dispute. In Ohio, as in most states, a court reviewing an insurance policy must give all the words and phrases in the contract " 'their natural and commonly accepted meaning.' " *Tomlinson v. Skolnik*, 540 N.E.2d 716, 718 (Ohio 1989) (quoting *Golmolka v. State Auto. Mut. Ins. Co.*,

436 N.E.2d 1347, 1348 (Ohio 1982). The doctrine of construing the language against the insurance company does not come into play unless a clause is ambiguous. *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1384 (Ohio 1988). As the District Court correctly concluded, the clause at issue in this case is not ambiguous. Once the "phantom comma" argument is rejected, the policy clearly requires that the "event" must take place during the policy term. That is the only reasonable reading of the clause.

After concluding that the relevant "event" must occur during the policy term, the District Court held that Babcock had not made the decision to use asbestos during that term. Anticipating that we might uphold the District Court on the first issue, Babcock contends that the District Court also erred with respect to the latter conclusion. This brings us back to the definition of "event." For purposes of this issue, we are assuming that the relevant event is Babcock's decision to use asbestos in its boilers. Accordingly, we now turn to the issue of whether a "decision" occurred during the term of the policy.

The most obvious use of "decision" would be to describe an explicit decision by Babcock's executive officers or board of directors to continue using asbestos in the boilers. Babcock, however, has presented no evidence to show that it formally reconsidered its stance on asbestos during the term of the policy and decided to continue using it. Instead, Babcock has offered a number of theories as to what might constitute the relevant decision. The first is a "continuing decision" theory; that is, every time Babcock made or offered to make a boiler with

the asbestos components, it remade the "decision". Babcock has also proffered a "continuing exposure" theory; that is, during the policy year, thousands of Babcock boilers containing asbestos were out in the marketplace. Babcock's decision to manufacture these boilers put workers in a situation where, during the policy year, they were exposed to asbestos. We agree with the District Court that these theories are not sufficient to establish that a decision took place during the policy term. In addition to being strained interpretations of a "decision," both of these arguments move away from Babcock's "one occurrence" scenario and start to sound remarkably like the Subscribers' "multiple occurrence" theory – each manufacture of a boiler or each exposure of a worker are separate "events" under the policy.

Finally, Babcock contends that even if they have not shown as a matter of law that a decision was made during the policy year, they have introduced sufficient evidence to create a triable issue of fact. We find no merit to this contention.

B. Number of Occurrences

Although the District Court did not decide the number of occurrences issue, it was fully briefed below. We apply *de novo* review to a grant of summary judgment and may affirm a grant of summary judgment on grounds other than those used by the lower court. *See, e.g., Baggs v. Eagle-Picher Indus. Inc.*, 957 F.2d 268, 273 (6th Cir.), *cert. denied*, 113 S. Ct. 466 (1992). Consequently we have chosen to address the "number of occurrences" issue.

To reiterate, the policy defines "occurrence" as "any happening or series of happenings, arising out of or due to one event taking place during the term of this contract. . . . " The parties essentially agree that, in the present context, the "happening or series of happenings" mentioned in the policy refers to the actual injury or disease suffered by a person exposed to the asbestos in Babcock's boilers. The parties, however, differ drastically in their definition of "event." According to Babcock, the "event" is Babcock's decision to use asbestos in its boilers. According to the Subscribers, the relevant "event" is each worker's exposure to the asbestos in the boilers. Thus, Babcock's definition of "event" would result in a finding of one occurrence. The Subscribers' definition, however, would result in many occurrences under the policy. Disputes over insurance policies are fundamentally contract disputes. As we discussed above, Ohio law requires that we look first to the language of the contract in trying to resolve the parties' dispute. We can go behind the face of the policy only if we determine that the controverted language is unclear or ambiguous.

The parties have directed our attention to a number of cases to assist us in construing the relevant language. Many of the cases cited by Babcock would superficially appear to support their position that only one occurrence exists. A closer look, however, reveals that the resolution of these cases turned on a definition of "occurrence" different from the one in the policy at issue. Of the cases cited by the parties, only three interpret definitions that are significantly similar to the one at bar. These are *Norfolk & Western Ry. Co. v. Accident & Casualty Ins. Co.*, 796 F. Supp. 929 (W.D. Va. 1992), *aff'd. in part and dismissed*

in part as moot, 41 F.3d 928 (4th Cir. 1994); *Pittsburgh Corning Corp. v. Travelers Indemnity Co.*, No. 84-3985, 1988 WL 5302 (E.D. Penn. Jan. 21, 1988); and *Northern Shipping Co. v. Arkwright Boston Mfg. Mut. Ins. Co.*, 617 F. Supp. 136 (E.D. Penn.), *aff'd.*, 774 F.2d 1152 (3d Cir. 1985).

Only one of these cases, *Pittsburgh Corning*, involved asbestos. Pittsburgh Corning manufactured a product known as Unibestos. The insurance policy defined "occurrence" as "one happening or a series of happenings arising out of or resulting from one event taking place during the term of this policy." Travelers argued that the cause of all injuries was Pittsburgh Corning's manufacture and sale of asbestos. The court rejected that argument, stating

> Pittsburgh Corning is being sued by thousands of claimants alleging exposure to Unibestos on hundreds of job sites, on thousands of different dates, and under a variety of conditions over a period of six years. Not everyone exposed to asbestos is affected and not all claimants were exposed under the same circumstances or to the same lot of asbestos. I hold that the 'cause' of the injuries in question is the exposure of each individual to asbestos. That exposure thus constitutes an occurrence for the purposes of determining the number of occurrences.

1988 WL 5302 at *2.

In *Norfolk & Western Railway*, the railroad brought an action against its excess insurer seeking to force the insurer to pay for claims arising out of noise-induced hearing loss. Again, the policy's definition of an "occurrence" is substantially the same as the definition in the

policy at issue in this case. The railroad attempted to argue that only one "event" existed under the policy – the railroad's failure to protect its employees from excessive noise. The court rejected this argument, declaring:

> The difficulty that the court has with this argument is that it leads to a result which would defy common sense. The typical single occurrence giving rise to multiple claims is the automobile accident which gives rise to a chain of events which results in injury to several parties. . . . In this case, a wide variety of machines in a number of different locations created a variety of sounds over the course of a number of years. Railroad employees working near these machines suffered injury to their hearing as a result of exposure to these sounds. . . . While the railroad's negligence may indeed have been a cause of the injuries, calling that negligence the single occurrence out of which the claims arose is nonsensical.
>
> The railroad's argument allows the cause test to sweep too broadly and arrives at a result which defies common sense. . . .

796 F. Supp. at 937. The court in *Northern Shipping* reached a similar conclusion, holding that the immediate cause of the injury was the relevant "event" for purposes of the policy, rather than a more remote cause. 617 F. Supp. at 138-39.

We find the reasoning of these three courts persuasive and agree with their result. Consequently, we reject Babcock's definition of "event." As Babcock relies exclusively on its proffered definition to support its theory for

recovery, the District Court correctly granted summary judgment in favor of the Subscribers.[2]

C. Failure to Warn

Creole Insurance Company, which provides an intermediate layer of excess insurance, was joined as an indispensable party to this action. After the District Court granted summary judgment in favor of the Subscribers, Creole filed a motion to alter or amend the judgment. In that motion, Creole argued that a relevant "event" had indeed occurred during the policy term, and that the event was Babcock's failure to warn its customers about the dangers of asbestos. The District Court denied Creole's motion, and Creole now appeals.

We need not address either the procedural posture or the merits of Creole's motion. Even if Creole is right, that only affects our holding on the "trigger of coverage" issue. It leaves undisturbed our primary holding that the relevant "event" is exposure to asbestos, not a more remote cause such as Babcock's decision to use asbestos or its failure to warn. Consequently, Creole's argument would not change the outcome of this suit, and we therefore decline to address it.

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[2] Babcock also argues that the District Court's conclusion leads to an absurd result because it creates a gap in coverage between the primary and excess layers of insurance. That result, however, is the logical one based on the language of the policy. The District Court did not "create" a gap. Rather, it simply recognized that the parties had drafted contract language that led to such a gap.

D. Choice of Law

In the event we reversed the District Court, the Subscribers cross-appealed the District Court's choice of law decision. As we have affirmed the lower court, we need not reach this issue.

III.

For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed Aug. 19, 1993)

As this court has previously stated, it has before it a plethora of motions to dispose of this cause in one manner or another. It is neither necessary nor beneficial to discuss any of these in this order because they address issues analytically distant from the primary question to be resolved. In reaching the conclusions stated below, the court relied on voluminous evidentiary supplements and detailed briefs, and, as well, the well-organized and articulate presentations of counsel made during hearings on the first set of motions. The cross motions for summary judgment on the occurrence issue are, however, immediately relevant.

All parties appear to agree that this matter is properly resolvable at this stage. Counsel for plaintiff explicitly advised the court to "rule based on the policy itself." (Hearing Transcript at 87.) Likewise, counsel for the defendants, summarizing the posture of the case, explained: "[T]here appears to be unanimous consent

there are no material fact disputes. The parties' disagreements in this case . . . boil down to the legal standard by which the policies should be interpreted, the manner in which it should be interpreted." (T. at 33.)

BACKGROUND

I. Adams & Porter Policy Number 8658.

Defendants in this action are subscribers to a policy of quota share excess umbrella insurance written by Adams & Porter (hereinafter, "the Policy"). The Policy generally provides excess liability insurance for J. Ray McDermott & Co., Inc. and its subsidiaries and affiliates. McDermott is the owner of plaintiff Babcock & Wilcox Company. The Policy which is the subject of this suit was effective between April 1, 1979 and April 1, 1980 ("the Policy term").

According to the terms of the Policy, the Underwriters agreed:

> to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of such liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries" as defined herein resulting from an "occurrence" as defined herein.

A limit of liability provision renders the Underwriters liable only when the claims arising from a single occurrence exceed $2.5 million. This limit functions in many respects in the manner of a deductible feature. The

Underwriters are not liable for more than $20 million for claims arising from a single occurrence.

The term "personal injury" is broadly defined to mean "bodily injury (including death at any time resulting therefrom), . . . sickness, [or] disease."

The critical term on which the parties focus is "occurrence" defined by the Policy as follows:

> The term 'occurrence', whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking place during the term of this contract in respect to all the Assured's operations."

II. Babcock & Wilcox' History.

Plaintiff has been in the business of manufacturing and servicing boilers since the mid-1800s.[1] An 1884 contract contains the first reference to asbestos use by plaintiff. By 1895, contracts provide evidence that plaintiff was specifying the use of asbestos-containing gaskets. (Dilling depo. at 23.) According to plaintiff, the word 'specification' as used here, means that customers were informed that if they selected asbestos as a product material, B&W would agree to and approve the use of asbestos. While at an earlier time asbestos was commonly used as an insulating material in boiler assemblies, the choice dictating the use of that material was first and foremost the choice

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[1] Plaintiff produced Marcia J. Dilling for purposes of testifying on plaintiff's historic use of asbestos. Ms. Dilling is a product technical representative for plaintiff and reviewed numerous contracts and other documents in preparation for her deposition.

of the client. But there is no question that B&W did, in fact, furnish asbestos-protected boiler units conjunctive with the role of installer of its boiler units. (Dilling at 26-30.)

After a boiler product is designed, utilizing standard documents which contain plaintiff's specifications, the boiler is fabricated. Fabrication may be done by plaintiff's employees, an outside contractor, or a combination of both. The fabricated components are then sent to the boiler site, be that a building, factory, power plant, or shipyard, and there installed. The insulation is usually installed at the boiler site as well. The installation may be executed by plaintiff or by third parties who receive the plaintiff's specifications and the fabricated components. (Dilling at 43-44.)

In 1972, according to plaintiff's witness, plaintiff stopped recommending the use of asbestos as an insulator. (Dilling at 38.) This decision is apparently reflected in what the witness refers to as "standard documents." (Dilling at 38.) These documents "specify what B&W approves." (Dilling at 46.) Customers could still seek to substitute a different component if they so chose. For example, while plaintiff stopped generally specifying asbestos-containing gaskets in 1983, one division continued to specify such gaskets until 1987. Indeed, that particular division continued to utilize asbestos-containing gaskets as a replacement part until 1992 for one customer who continued to request them. (Dilling at 56.) Plaintiff stopped specifying asbestos braid in the early 1980s. (Dilling at 58.)

The decision to curtail specification of asbestos as an insulator and as asbestos-containing cement appears to have been motivated by two forces. First, in 1970, asbestos was put on a toxic substance list. Second, an increasing number of plaintiff's clients requested a replacement for asbestos. Thus, concern about toxicity and response to market preferences (which may themselves have been dictated by concern about toxicity) led to the change in specification in the early 70s. (Dilling at 61.)

III. The 1979-1980 Asbestos Claims.

The parties have entered into a number of stipulations which effectively define the nature of the claims for which plaintiff now seeks indemnification from the subscribers to the Policy. First, the asbestos-related bodily injury claims submitted "arise from liabilities imposed upon B&W by various federal, state, and/or municipal courts, and/or under settlement agreements entered into by B&W." (Docket # 246 at 9.) Second, the asbestos-related claims submitted under the Policy are personal injury claims as defined in the Policy.

Third, the claims are described as "claims for personal injuries, which are alleged to have occurred in part or in whole, during the Policy period of April 1, 1979 to April 1, 1980 (the 'Policy Period')." *Id.* at 9-10.[2] From

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[2] The term "occurrence" has a highly specific meaning within the context of this cause. The parties have not argued that "occurred" is used in the stipulation as a term uniquely defined by the Policy. Rather, it appears that "occurred" is utilized in the stipulation in its generic, everyday sense.

Plaintiff's briefing, it appears that the claims were made by third parties who, during the Policy Period, were exposed to asbestos-containing products manufactured by plaintiff. None of the individual asbestos-related bodily injury claims filed against B&W exceed $2.5 million. The aggregate total of the asbestos-related bodily-injury claims based on exposure to asbestos-containing boilers during the Policy Period does exceed $2.5 million.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, a court must consider the pleadings, related documents, evidence, and all reasonable inferences in a manner most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 86 L.Ed.2d 142 (1970); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). Rule 56 provides, in relevant part, as follows:

> (c) . . .
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> . . .
>
> (e) . . .
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by

> affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Three Supreme Court cases have provided guidance as to the nature of the respective burdens allocated under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The ultimate burden lies with the non-moving party to show the existence of a genuine issue of material fact. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-587 (emphasis supplied). "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The court in *Anderson* held that "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had a full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

On the other hand, the moving party's burden under Rule 56 is lighter.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c) . . . suggests the absence of such a requirement.

Celotex, supra, at 323 (emphasis supplied).

The Sixth Circuit Court of Appeals, in *Street v. J. C. Bradford and Co.*, 886 F.2d 1472 (6th Cir. 1989) recently reviewed court decisions and commentary regarding the impact of *Anderson, Celotex,* and *Matsushita* on summary judgment practice. The court concluded that a "new era" in summary judgment practice has opened in the court system as a result of these opinions.

> Scholars and courts are in agreement that a "new era" in summary judgments dawned by virtue of the Court's opinions in these cases . . . On the whole, these decisions reflect a salutary return to the original purpose of summary judgments. Over the years, decisions requiring denial of summary judgment if there was even a suggestion of an issue of fact and

> tended to emasculate summary judgment as an effective procedural device.

Street, supra, at 1476.

The court enunciated the following "new era" principles, among others: as on federal directed verdict motions, the "scintilla" rule applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion; the respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment"; the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. *Id.* at 1479-1480 (footnotes and citations omitted).

LAW AND ANALYSIS

This cause is governed by Ohio law. Under Ohio law, an insurance policy is a contract governed by general rules of contract law. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 665 (1992), *cert. denied* 113 S. Ct. 1585 (1993). The cardinal rule of construction is that if an insurance contract is clear and unambiguous, the contract must be interpreted in accordance with its plain meaning. *Hybud Equip.*, 64 Ohio St. 3d at 665. This long-followed rule is designed to prevent a court from rewriting an insurance policy otherwise susceptible to only one reasonable interpretation. *National Life Ins. Co. v. Ray*, 117 Ohio St. 13, 22 (1927) ("Insurance policies, like other written contracts, mean what they say and all they say. They are written for the protection of both parties

thereto, and all others interested in the policies. If such policies are not to be enforced as written, they might as well not be written at all.") The intention of the parties must be derived from the whole contract, not by focussing [sic] on any one part. *Tomlinson v. Skolnick*, 44 Ohio St. 3d 11, 13 (1989).

I. Plaintiff's Construction and Application of the Policy.

In the instant cause, plaintiff claims that the third-party asbestos-related personal injuries collectively constitute one series of happenings arising out of one event and therefore, collectively constitute one occurrence. Such a construction of the Policy could trigger coverage under the Policy because, while no single asbestos-related injury claim against plaintiff exceeds $2.5 million, the aggregate of asbestos-related injury claims does far exceed the "deductible."[3]

Plaintiff reaches its interpretation by applying certain meanings to the terms which define "occurrence". First, plaintiff claims that "happening or series of happenings" is synonymous with the harm for which plaintiff is indemnified – personal and bodily injures. Second, plaintiff claims that "event" means the tortious act which ultimately caused the personal injury. Third, plaintiff claims that the phrase "series of happenings" specifically indicates that multiple injuries sharing a common cause should be aggregated as a single occurrence. Finally,

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[3] Defendant subscribers have also moved for summary judgment based on a series of affirmative defenses. It is unnecessary to analyze the merits of those motions.

plaintiff asserts that only the personal injury must occur during the Policy term.

Applied to this case, plaintiff argues that the asbestos-related diseases for which claimants filed actions against plaintiff are a series of happenings. Plaintiff defines the one event out of which these injuries arose as plaintiff's decision to specify asbestos-continuing components in the design, fabrication, assembly and servicing of boilers. Plaintiff claims that because part of the injury to the claimants occurred during the Policy term, the claims satisfy the temporal requirements of the Policy.

After noting that a chief source in interpreting policy language is case law, plaintiff offers a variety of cases to support its interpretation and application of the Policy. According to plaintiff, this court should follow the instruction that "the Court's inquiry is whether there was one proximate, uninterrupted and continuing cause which resulted in all the injuries and damages." *Owens-Illinois, Inc. v. Aetna Casualty and Sur. Co.*, 597 F. Supp. 1515, 1527 (D.D.C.) (applying Ohio law). Plaintiff cites an Ohio opinion which concluded: "[A manufacturer's] decision to manufacture and distribute asbestos-containing brake components constitutes the single-occurrence out of which the 'asbestos claims' arose." *Morton Thiokol, Inc. v. Aetna Casualty and Sur. Co.*, No. A-8603799, slip op. (Hamilton Cty. C.P. Dec. 28, 1988). Finally, plaintiff cites a variety of opinions and annotations which demonstrate that other courts have held that a single occurrence arises from the continuing manufacture and sale of asbestos-containing products. *See e.g., Air Prods. & Chem. v. Hartford Accident and Indem. Co.*, 707 F. Supp. 762, 777 (E.D. Pa. 1988).

Defendants concur in interpreting the happening as the injury or damage for which coverage is sought. Defendants interpret the event to be the accident or fortuitous incident that gives rise to or causes the injury or damage. Defendant also argues that the 'event' must take place during the Policy period. This interpretation, in conjunction with certain contentions arising from the facts, lead defendants to a different conclusion.

First, defendants contend that the use of asbestos by plaintiff can not be characterized as an event taking place during the Policy period. Second, defendants contend that even if the use of asbestos is an event within the Policy period, it would not be an *insurable* event since the injuries were not fortuitous – by 1979, plaintiff knew of the harms from asbestos-exposure. In light of these contentions, defendants believe that the only plausible interpretation of the Policy is that the event is the *exposure of an individual to asbestos* and that the happening is the injury sustained by the individual due to the exposure.

II. Interpretation of 'Occurrence' Definition.

As presented, plaintiff's interpretation of the definition of 'occurrence' is problematic. Such an interpretation is predicated on a strained reading of the temporal restriction in the Policy. Plaintiff claims that the definition of 'occurrence' does not require that the event which is the cause of the personal injury occur during the Policy term and further claims that the Policy requires that the happening, that is the injury, occur during the Policy

term. It is believed that such an interpretation is inconsistent with the plain meaning of the definition and is also inconsistent with apparently accepted practice in the insurance industry.

Broken into its components, the definition of occurrence has four relevant parts: "[1] any happening or series of happenings, [2] arising out of or due to [3] one event [4] taking place during the term of this contract." Plaintiff's analysis focusses primarily upon the first and third portions of the definition.

Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term 'event' and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the *event*, not the happening, must occur during the term of the contract.

During the oral argument on the motions, plaintiff argued that "there appears to be a comma missing" and that "[t]his definition was written by the insurance industry and they could have drafted a clearer definition." (T. at 9-10.) With regard to the missing comma theory, the court must confine itself to the content of the document. This court can no more decide this case based on phantom punctuation than it could decide this case based on words and phrases not incorporated in the contract.

As for the clarity of this provision, it should be noted that plaintiff initially argued that the provision is clearly

and unambiguously in its favor. (Docket #267 at 13 ("[T]he Subscriber policy is not ambiguous.")) But the same party also argues that if the passage is not interpreted in its favor, the passage must be ambiguous and unclear. (T. at 9.) As a substantive matter, the court is of the opinion that the provision is clear and unambiguous. Plaintiff's own arguments reinforce this conclusion.

Beyond the plain grammar, plaintiff strenuously argues that the Policy is what is called an occurrence policy, as distinguished from a claims-made policy or an accident policy. (Hearing Trans. at 8.) This construction of the Policy is consistent with the interpretation by another court in regard to a policy with a substantially similar occurrence definition. *Pacific Resources, Inc. v. American Bureau of Shipping*, 1984 WL 928 (S.D.N.Y. 1984). The *Pacific Resources* court explained the difference between an occurrence policy and a claims-made policy:

> The Bumbershoot policy is an 'occurrence' as opposed to a 'claims made' policy; it protects the policy holder from liability for any act done while the policy is in effect, whereas a 'claims made' policy protects the holder against claims made during the life of the policy. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 n.3 (1978). Thus, a shipowner/operator who operated for only one year, say in 1975, would only need one 1975 'occurrence' policy, but would require several years of 'claims made' policies to protect itself from claims arising out of acts in 1975. *See St. Paul Fire*, 555 F.2d 3, 5 n.1 (1st Cir. 1977).

Pacific Shipping at 4. *See also Kaiser v. Wood*, 1992 WL 2538 *3 (Ohio App. 1992) (distinguishing claims made policy);

Chicago Insur. Co. v. Mills, 1989 WL 50668 *2 (Ohio App. 1989) (noting that an occurrence policy is "one which covers only acts which occurred during the policy's term."); *Mitchell v. Continental Casualty Co.*, 1981 WL 2945 *3 (Ohio App. 1981) ("in an 'occurrence' policy the coverage is effective if the negligent or omitted act occurred during the period of the policy, whatever the date of discovery.")

Under plaintiff's interpretation, the Policy only protects the assured in the event an injury occurs during the policy year. However, if, for example, an assured manufactured a defective boiler in 1979 and it did not explode until 1982, because the injury did not occur during the term of the contract, the injury would not be insured. In effect, under this interpretation, an assured is required to secure a series of policies to adequately indemnify itself. Such a practice is directly inconsistent with the usual interpretation and intent of an occurrence policy.

On the other hand, by interpreting the contract to require that the event, that is the causative act, occur during the term of the contract, the policy is consistent with the usual meaning and import of an occurrence policy. In sum, plaintiff's interpretation is both contrary to plain meaning and, on its face, not reasonable considering the policy as a whole. To prevail, plaintiff must show that the claims for which it seeks payment from the Subscribers are for injuries which arose from a common event which took place during the Policy term.

Through the extensive course of briefing, defendants articulated a variety of arguments in opposition to plaintiff's claim. Eventually, defendants' argument evolved to

the position that, first, the court must rule that the common event had to occur during the Policy period. Second, defendants argued, even if this court accepts the general meaning of the other terms propounded by plaintiff, the instant cause must be dismissed because plaintiff can not show that the claims arose from a common event which arose during the Policy term. This argument has the attractive quality of simplicity. Rather than analyze the depth of defendants' substantive objections to plaintiff's general interpretation of the Policy, this court, having accepted defendants' specific objection to plaintiff's interpretation of the temporal requirement, shall focus its analysis on the question of the common event. If no common event occurred during the Policy period, plaintiff's claim must necessarily fail.

III. Decisional Continuum as Causative "Event".

Plaintiff argues that all asbestos-related bodily injury claims were necessarily caused by the decision to specify and use asbestos in manufacturing and repairing boilers and boiler components.[4] Accordingly, the court is asked to accept that asbestos-related personal injuries arise from or are due to that decision. In effect, the decision is the "event". However, no evidence linking the injuries to

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[4] [T]he event is the continuing decision to use or permit the use of asbestos in the boilers; the happenings or the series of happenings are the injuries.

But even if you do find that the event has to occur in the policy year, in this case the event is a continuing decision and it also occurred during the policy year.

(Tr. at 10.)

a decision made during the Policy term was presented. Rather, the injuries are linked to the decision to use and specify asbestos in general, not to any decision to use or specify the use of asbestos specifically made during the Policy term.

Plaintiff has argued that the Policy is an occurrence policy. The court concurs. As an occurrence policy, it is irrelevant when an injury occurs. To the contrary, an occurrence policy is explicitly designed to insure *whenever* an injury occurred. Otherwise, as previously noted, the assured would have to secure a series of policies into an indefinite future to secure adequate insurance.

Applying this theory to a more conventional product liability context, if an assured decided to use a defective valve in a boiler in 1940 and continued to specify that valve in boilers until 1980, the insurer for 1975 would be liable for an explosion in 1975 of a 1945 boiler even though the decisions relating to the exploded boiler were made thirty-five years before the policy was written. On the other hand, once the assured ceases to specify the defective valve, no insurer is liable for subsequent explosions of the defective boilers. Thus, it can be seen that this theory works the opposite of an occurrence policy. In an occurrence policy, no matter when an injury occurs, the claim is referred back to the policy in force at the time the injury was caused. Under plaintiff's theory, an injury is referred forward to the policy in effect when the injury occurs regardless of when the injury was caused. As previously noted, plaintiff's counsel argued that the Policy is an occurrence policy, not some kind of hybrid "injury-occurred" policy. This court concurs with that construction.

Under the terms of the Policy, when an injury is inflicted is irrelevant to the occurrence definition. The timing of the cause of the injury is relevant. The court must reject plaintiff's argument that an individual injured by asbestos during the Policy term because of a decision to specify asbestos before the Policy term has an injury arising from an event during the Policy term. Plaintiff must demonstrate that the injuries were caused by an event in 1979-1980. To hold otherwise would substantially rewrite a critical passage of the contract.

A number of opinions were cited in the briefs and at the hearing. Of these, only two definitely deal with how Ohio courts would interpret the contested provisions. The remaining cases are cited to support less controversial issues.

Owens-Illinois is attacked by defendants because it has come under sharp criticism in subsequent opinions. *See Norfolk & Western Rwy. Co. v. Accident & Cas. Ins. Co.*, 796 F. Supp. 929 (W.D. Va. 1992), *appeal pending*. It is not necessary to resolve the continued vitality of *Owens-Illinois* because the case addresses a fundamentally different legal issue from that posed herein.

The definition of "occurrence" interpreted in *Owens-Illinois* provided:

> "occurrence" means an accident, including injurious exposure to conditions, *which results, while this policy is in force,* in personal injury, property damage or advertising offense which is neither expected nor intended from the standpoint of the insured.

Owens-Illinois, 597 F. Supp. at 1529 (emphasis added). In contrast to the Policy here, the *Owens-Illinois* policy is triggered by a result, that is an injury, occurring during the policy term. It is irrelevant when the injury was caused under the *Owens-Illinois* policy. Whether or not the D.C. District correctly applied Ohio law in *Owens-Illinois* is largely irrelevant since, even if its interpretation were appropriate in that case, it is not appropriate in the instant case which involves a policy with a substantially different definition.

Morton Thiokol v. Aetna is also unhelpful. Morton Thiokol sought partial summary judgment against Aetna as to Asbestos Claims Premiums. The Court of Common Pleas, after listing the documents it read in conjunction with the motion, declared that there were no issues of material fact. Beyond that, the court merely held: "Morton Thiokol's corporate decision to manufacture and distribute asbestos-containing brake components constitutes the single occurrence out of which the 'asbestos claims' arose." *Morton Thiokol*, slip op. at 1. The record does not contain any reference to when the corporate decision was made or how corporate product design occurred.

An Ohio Court of Appeals reversed the court of Common Pleas in a related case involving this same policy. The Court of Appeals ruled that the trial court erred in applying Ohio law. *Motion Int'l, Inc. v. Aetna Cas. & Sur. Co.*, 1991 WL 201651, 6 (Ohio App. 1991). In that opinion, the appellate court noted that the policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* at 3. The policy

language which forms the foundation for any interpretation was again substantially different from the Policy involved in the instant suit. Likewise, given the cryptic order of the trial court upon which plaintiff relies, it is impossible to determine whether the decision is based on an underlying factual predicate which is at all analogous to the instant cause.

An Ohio appellate court has applied a "continuous event" theory of causation to at least one case involving an occurrence policy of excess liability insurance. *See Phoenix Phase I Assoc. v. Ginsberg, Guren & Merritt*, 23 Ohio App. 3d 1 (1985). *Phoenix* involved malpractice by a law firm involved in a real estate deal. The court held that the liability should be apportioned between a 1972-73 and a 1973-74 insurance policy because, while the decision to endorse the deal occurred during the first policy, all investors were also harmed by the firm's equally negligent failure to explain certain remedies available to upset investors during the second policy. *Id.* at 3. The case is noteworthy because the Ohio court did not merely rely on the fact that the firm did not change its initial negligent decision but rather the court emphasized an independent negligent act which took place during the second policy period.

As a matter of law, it is apparent that given the specific language of the Policy and the general approach to this area of excess insurance, an Ohio court would require plaintiff to point to some act taking place during the Policy period as a contractual predicate to Subscriber liability.

CONCLUSION

In interpreting the Policy, this court is constrained by the terms to which the parties agreed. When those words have a single, plain meaning, this court must apply that meaning. The definition of occurrence contained in the Policy plainly requires that an occurrence is all injuries caused by an event which took place during the term of the contract. Even accepting, *arguendo*, any definition of a decision as the causative event, the evidence in this case does not relate the claims to any specific decision made during any identifiable period, let alone to a decision made during the Policy term. As such, the claims can not be said to implicate the liability of the Subscribers. Defendants' motion for summary judgment (docket #271) is hereby GRANTED.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed Aug. 19, 1993)

This Court having filed its order of decision of the matters in this action, therefore, pursuant to Fed. R. Civ. P. 58, IT IS ORDERED that this action is hereby terminated.

Further, the court instructs the parties to make provision with the Clerk's Office to effect prompt removal of the affidavits filed under seal with the Clerk.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX CO., Plaintiff, - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE CO., et al. Defendants.	CASE NO. 5:91CV0987 Judge Sam H. Bell ORDER (Filed April 9, 1993)

Pending before the court are a variety of motions and cross-motions for partial and complete summary judgment. These motions are accompanied by a voluminous factual record. It is immediately apparent that these motions and the accompanying exhibits raise substantial factual and legal questions. It is not, however, immediately clear that the factual questions are material questions of fact which should be reserved for a jury's consideration. To the contrary, at various points in the briefs of both sides, the parties argue that the instant cause is ripe for resolution based on the motions.

The current posture of this case presents a variety of legal, factual, and practical difficulties for the court. Now before the court is an array of motions for summary judgment, partial summary judgment cross-motions for summary and partial summary judgment and interlocking reply/responses. Accompanying this torrent of legal argument and authority is an ocean of evidence filed in the form of appendices. These latter volumes include extensive deposition excepts, sample contracts, actual

contracts, drafting history, correspondence, notes, unreported cases and even a decades old thesis on excess liability insurance. The record now contains approximately 1,500 pages of supplemental material which the court is expected to consider and comprehend.

Considering the entirety of this material is both time consuming and frustrating given the desireability [sic] of reaching a prompt resolution of this matter. But because of the literal mass of the material submitted, we have only now come to the point at which any oral presentation might be profitably made and understood.

The first motion before the court is third party defendant McDermott, Inc.'s motion for partial summary judgment filed on January 25, 1993. That motion seeks three things. First, "judgment that McDermott has satisfied all conditions and/or warranties regarding the maintenance of proper underlying insurance and the 'buffer layer' ". Docket #265 at 1. Second, McDermott urges, "that this Court declare that all third-party asbestos related bodily injury claims against B&W are the result of one occurrence." *Id.* Finally, McDermott urges that the defendant/third party plaintiff subscribers "are not entitled to rescind or reform the policy." *Id.* at 1-2. McDermott's supporting memorandum also seeks permission to supplement the memorandum with additional facts in the event the subscribers' motion to amend the pleadings is granted.

The second motion, also filed January 25, is Babcock & Wilcox's motion for partial summary judgment. Like McDermott, Babcock & Wilcox "requests that the Court enter judgment that third party asbestos-related bodily

injury claims are the result of one occurrence." Docket #267 at 1.

Defendant subscribers joined the paper fray with two motions of their own filed simultaneously with the preceding motions on January 25. The first motion is styled, "Defendant Subscriber's Motion for Summary Judgment of Dismissal or, Alternatively, for Summary Judgment on Their Third Party Complaint." This motion primarily rests on one argument: "The Court should rule that the claim of each asbestos bodily injury claimant is a separate 'occurrence' within the meaning of the Subscriber and Creole policies." Docket #271 at 23. This motion also advances the argument that, if the Subscribers are liable to Babcock & Wilcox, they deserve to be indemnified by McDermott for failing to satisfy all of the warranties and conditions of the Subscriber policy. In effect, this motion is a cross motion addressing substantially the same issues addressed in the previously noted motions of Babcock & Wilcox and McDermott.

The other motion by Subscribers seeks summary judgment on another alternative theory. It is styled, "Motion for Summary Judgment on Certain Defendants' Reformation, *Uberrimae Fidei* and Rescission Defenses." Docket #272 at 1. This motion asserts affirmative defenses upon which Subscribers base their claim for dismissal.

The second wave consists of Babcock & Wilcox's motion for summary judgment on the rescission and reformation issues as well as the applicability of the doctrine of *uberrimae fidei*. This motion was filed on March 5, and is obviously a cross motion opposing the second of

Subscribers' two motions. Plaintiff also filed a memorandum and exhibits opposing subscribers' first motion for summary judgment and supporting plaintiff's motion for partial summary judgment on the occurrence issue.

The sixth motion for summary judgment was also filed on March 5, by third-party defendant McDermott for dismissal of the third party complaint. This motion is also styled to serve as McDermott's opposition to subscribers' motion for summary judgment on the third party complaint.

In addition to the memoranda accompanying the actual motions, the parties have filed numerous other response and reply briefs including supplemental appendices and exhibits. The briefing has reached the surreply stage now where parties are filing briefs initially protesting that their opponent has filed an unpermitted brief and then seeking this court's leave to do the same.

The effect of this course of briefing is to bifurcate the legal issues raised by this cause. One set of cross-motions generally deals with defining a single occurrence under the policy. The second set generally deals with subscribers' affirmative defenses. Disentangling the corpus of motions and briefs beyond this rough division is not currently practicable.

Counsel for the defendants has suggested that this court's deliberations might be better guided if the parties are given an opportunity to argue the motions before the court. That suggestion is well taken. Therefore, this court now orders that the parties appear for a hearing on May 14, 1993, at 9 a.m. At that hearing, each side shall be

allotted 90 minutes in which to make a presentation and answer the inquiries of the court.

The motions present a number of discrete legal issues which have been, and may properly continue to be, treated independently. While the underlying facts are the same, the legal analysis required to resolve these issues is different. To best utilize the oral argument process, the May 14 hearing is to be dedicated only to consideration of the cross-motions for summary judgment regarding interpretation of the insurance policy, specifically, the meaning and interpretation of the operative provisions of the occurrence definition. Consideration of third-party issues involving McDermott Inc. and affirmative defenses such as reformation and rescission *will be deferred* to a future hearing which shall be scheduled as needed.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX COMPANY Plaintiff - vs - ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY, et al. Defendant	CASE NO. 91-CV-987 Judge Sam H. Bell ORDER (Filed Aug. 3, 1992)

Presently before the court in the above-captioned cause is a motion in limine by plaintiff, The Babcock & Wilcox Company (B&W), for a determination of which state law, in the absence of a choice of law by the parties, is to be applied in construing a disputed term of B&W's liability insurance contract with defendant insurers. Plaintiff contends that, under the "more significant relationship" analysis adopted by Ohio courts, Ohio law should be applied. Defendants have filed a brief in opposition in which they contend that, under the same analysis, Louisiana law should be applied.

BACKGROUND

The present action involves a dispute over liability insurance coverage for asbestos-related claims arising from B&W's design, manufacture, sale, and service of boilers. Sales of the B&W boilers relevant to the present litigation were made on a nationwide and worldwide

scale. Claims against B&W for exposure to asbestos during the relevant time period of 1979-80 were likewise filed throughout the United States and the world.

B&W is a corporation organized under the laws of Delaware. While at the time of contracting certain of its corporate offices had been relocated from New York to Louisiana, B&W's principal place of business was and remains Ohio, where the majority of its management, manufacture, and design operations are conducted, where the major portion of its employees reside, and where the bulk of its assets are located.

None of the defendant insurers has its place of incorporation or its principal place of business in either Louisiana or Ohio. Most of the defendant insurers, however, have obtained certificates of compliance with the insurance laws of Ohio and are licensed to conduct insurance business in the state.

In 1978, B&W became a subsidiary of J. Ray McDermott & Company (McDermott), a Louisiana-based corporation. While its nominal headquarters became located in Louisiana, B&W retained its separate corporate identity, and continued its major operations in Ohio. The responsibility for securing B&W's 1979-80 liability insurance coverage shifted to McDermott. Through its authorized Texas-based insurance broker, Adams & Porter Associates Inc., McDermott secured a multiple-layer comprehensive liability insurance policy for 1979-80 with defendant insurers on behalf of all its subsidiaries. However, specific and separate terms of coverage for B&W were individually considered and provided for in the otherwise

general insurance contract. The contract did not include any choice of law provision.

Subject to McDermott's approval, Adams & Porter negotiated the terms of the insurance contract with defendant insurers. Negotiations took place primarily in Texas, New York, and England. The defendant insurers ultimately executed the insurance policy at their respective offices, none of which was located in Louisiana or Ohio. The executed policy was assembled by Adams & Porter at its Texas office and delivered to McDermott at its New Orleans, Louisiana, office. Premiums on the policy were paid out of McDermott's office to Adams & Porter in Texas, which then distributed the proportionate shares of the premiums to the defendant insurers at their respective offices.

While B&W's parent corporation, through its authorized agent, obtained this secondary excess liability insurance coverage for B&W in the amount of 17.5 million dollars, B&W retained its own separate primary comprehensive general liability policy with Travelers Insurance Company in the amount of two million dollars, and a first layer of excess coverage with Creole Insurance Company Limited in the amount of $500,000. There is no dispute over the fact that the primary coverage with Travelers has been exhausted; B&W and Creole agree that the Creole first-layer excess coverage has likewise been exhausted and paid out in full. Defendants contend, however, that the first layer of excess coverage with Creole has not been exhausted, and that they are therefore not obligated to reimburse B&W for any claims paid.

The central point of dispute between the parties is the construction of the term "occurrence" as it is used in the secondary excess liability insurance contract with defendant insurers, and in the primary excess liability insurance contract between B&W and Creole. Although neither party offers any analysis of the respective constructions of this term under the laws of Ohio and Louisiana, the parties are in apparent agreement that the legal construction of this term would differ significantly depending upon which state's law is applied, and that the choice of the applicable law would be virtually dispositive of the respective rights of the parties under the contract.

The scope of coverage of the insurance contract with defendant insurers is as follows:

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State, and Municipal or other qualified authority or in respect of such liabilities assumed by the Assured under contract or agreement, for "property damage" and "personal injuries", as defined herein resulting from an "occurrence" as defined herein.

The definition of the term "occurrence" is the same in both the contract with defendant insurers and the contract with Creole:

> The term "Occurrence", whenever used herein, shall mean any happening or series of happenings, arising out of or due to one event taking

> place during the term of this contract in respect to all the Assured's operations.

Generally, there are three varying approaches taken by courts in construing the term "occurrence" under such a liability insurance policy. See Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence*, 64 ALR 4th 668 (1988). Of relevance herein are two of these approaches, which respectively look to either the cause or to the effect of injury to determine the number of occurrences for purposes of liability coverage.

B&W urges a construction of "occurrence" that defines it in terms of the underlying *cause* of the multiple asbestos-related injuries and resulting claims. Thus, as there was but one occurrence that caused the asbestos-related claims against B&W – the design and manufacture of asbestos-containing boilers – the total amount of money paid out in disposing of the numerous resulting claims is aggregated to determine whether the policy limits of the Creole primary excess liability coverage have been exhausted, and the threshhold of defendant insurers' secondary excess liability coverage has been reached. This approach to construing "occurrence" is taken by the vast majority of courts. *Id.; Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374, 379 (6th Cir. 1984). For present purposes the court will presume, in the absence of any analysis of this issue by the parties, and in view of B&W's stance on the issue presently before the court, that Ohio law is in keeping with this majority approach.

Defendant insurers, on the other hand, espouse the minority view that "occurrence" is to be construed in terms of the ultimate *effect*, thus rendering each individual injury or claim a separate occurrence. Under this construction, defendant insurers' obligation to pay on any one of these claims is not triggered until liability for that claim exceeds the $500,000 policy limits of the Creole policy. Because the typical asbestos-related claim is allegedly disposed of for about $10,000, this would mean that defendant insurers would not be obligated to pay on any of the claims. For the reasons stated above, the court will presume that Louisiana law supports defendant insurers' construction of "occurrence". The court would note, however, that Louisiana courts are apparently in conflict over which approach to take. See 64 ALR 4th at 674, 680-81.

CHOICE OF LAW PRINCIPLES

In a diversity action, the district court is obliged to apply the choice of law rules of the state in which it sits. *Klaxon v. Stenton Electric Mfg. Co.*, 313 U.S. 487, 491, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Boyd v. LaMaster*, 927 F.2d 237 (6th Cir. 1991). This court must therefore apply Ohio choice of law rules.

For the present action, the determinative Ohio choice of law rules are set forth in *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St. 3d 43, 487 N.E.2d 568 (1986), and *Gries Sports Enterprises, Inc. v. Modell*, 15 Ohio St. 3d 284, 473 N.E.2d 807 (1984), cert. denied 473 U.S. 906 (1985). Ohio choice of law rules mandate that the law of the state with the more significant relationship to the contract should

govern disputes arising from it. *National Union Fire Ins. v. Watts*, 963 F.2d 148 (6th Cir. 1992). To determine which state has the more significant relationship to the contract, Ohio law has adopted the test set forth in the Restatement (Second) of Conflict of Laws, Section 188. *Mccurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 822 (6th Cir. 1990); *Ferrin, supra; Modell, supra.*

> Section 188 states, in relevant part:
>
> (2) In the absence of an effective choice of law by the parties, * * * the contacts to be taken into account in applying the principles of [Section] 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The plain language of Restatement (Second) of Conflict of Laws Section 188, as adopted by Ohio case law, requires the court to consider the Section 188 factors in applying the general principles enunciated in Restatement (Second) of Conflict of Laws Section 6 to determine the law applicable to an issue. *Watts, supra.* Section 6 sets forth:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability, and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

As to the application of the above principles, the parties are not in dispute. The parties are in dispute, however, over whether under Ohio conflict of laws principles this court may apply the provisions of a related Restatement section, Section 193, and the comments thereto. Section 193 reads:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of

> the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in [Section] 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Comment *b* to Section 193 provides that "The location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state." Where no principal location of the risk can be determined, Comment *a* to Section 193 requires that the governing law be determined by application of the general principles set forth in Section 188.

Comment *f* to Section 193 deals specifically with "multiple risk" insurance policies of the type at issue in the present case. Comment *f* states, in part:

> *Multiple risk policies.* A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y, and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk. So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and obligations of the parties under the policy, at least

> with respect to most issues, in accordance with the local law of X. * * *

The principles governing the federal courts' determination of state law are summarized in *Grantham and Mann v. American Safety Products*, 831 F.2d 596, 608-609 (6th Cir. 1987):

> In diversity cases, the federal courts must apply state law "in accordance with the then controlling decision of the highest state court." * * * If the forum state's highest court has not addressed the issue, the federal court must ascertain from all available data, including the decisional law of the state's lower courts, restatements of law, law review commentaries, and decisions from other jurisdictions on the "majority" rule, what the state's highest court would decide if faced with the issue. * * * Nevertheless, although a decision by a lower state court is not controlling where the highest state court has not spoken, * * * the decision of "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." * * * (Citations and emphases omitted).

ANALYSIS

Plaintiff urges this court to find that Section 193, which emphasizes the principal location of the insured risk as the primary factor in determining the controlling law, would be adopted by Ohio courts if they were presented with the issue herein. Plaintiff further contends

that, under Section 193, Ohio is the state with the more significant relationship with respect to the construction of the terms of the liability insurance contract because Ohio is the principal location of the insured risk, i.e., the situs of the major portion of the operations and assets of Babcock & Wilcox.

Defendant insurers contest the assertion that Ohio is the principal location of the insured risk. Defendants contend that Section 193 cannot be applied in the present case because no Ohio court has as yet adopted it, and indications are that Ohio courts would not adopt it; alternatively, defendants contend that Section 193 is inapplicable to the present facts by its own terms. Ultimately, defendants argue that the application of the principles enumerated in Section 6 and Section 188 mandates a finding that Louisiana law is controlling, in that Louisiana was the principal place of contracting, and because the goals of uniformity and predictability will be best served by application of Louisiana law.

Location of the Insured Risk

Our first inquiry is to determine whether or not Ohio is the principal location of the insured risk in the present case. If not, then the question of whether or not Ohio courts would adopt Section 193 would be rendered moot, as our analysis in that case would be confined to the application of the principles set forth in Section 6 and Section 188. See, e.g., *General Acc. Ins. Co. v. Insurance Co. of North America* (1990), 69 Ohio App. 3d 52, 590 N.E.2d 33; *Compagnie des Bauxites v. Argonaut-Midwest Ins.*, 880

F.2d 685, 690 (3rd Cir. 1989); *Sandefer Oil & Gas v. Aig Oil Rig of Texas, Inc.*, 846 F.2d 319, 324 (5th Cir. 1988).

Plaintiff's theory is that the "insured risk" in the present contract is the risk of loss to the insured, i.e., the risk of depletion of the insured's assets as a result of liability for claims made against it. Under this view, since Ohio is the principal location of the insured's assets, Ohio is therefore the principal location of the insured risk.

Although B&W cites no cases where "insured risk" is expressly construed in this manner, it finds some support for this approach through extrapolation of the language and holdings in a handful of cases: *Republic-Franklin Ins. Co. v. Progressive Casualty Ins. Co.* (1976), 45 Ohio St. 2d 93, 95, 341 N.E.2d 600 ("A liability insurance policy is written for the protection of the insured."); *Eagle-Pilcher Industries v. Liberty Mutual Ins. Co.*, 829 F.2d 227, 248 (1st Cir. 1987) (Ohio law applied in insurance coverage dispute over asbestos-related claims because the question of whether an Ohio manufacturer "is entitled to reimbursement, and to what extent, for the many millions of dollars in claims paid as a result of injuries caused by its products is of major concern to the state in which the business is domiciled."); *Unigard Security Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 589 (S.D.N.Y. 1991) ("In the mass tort context, the state where the insured is located has been held to be the state having the greatest interest in the application of its law concerning insurance coverage.").

Defendants contend, on the other hand, that the "insured risk" is the risk of claims being made against the insured. Since claims for asbestos-related injury have

arisen against B&W nationwide and worldwide, and since the contract explicitly provides coverage for the insured regardless of the geographical location of the claim, there is no one state that can be regarded as the principal location of the insured risk. In support of this construction, defendants cite several cases, the chief ones being *General Acc. Ins. Co., supra; Compagnie des Bauxite, supra;* and *Sandefer Oil & Gas, supra.* As with the cases cited by plaintiff, none of these cases expressly construe "insured risk" in the manner proposed; at best, these cases implicitly presume without any analysis of the issue that the situs of the insured risk is determined by where the injury occurred and/or the claim was filed.

The equation of "insured risk" with claims made appears appropriate enough where one of the issues is the insurer's duty to defend against claims wherever they may arise. See, e.g., *General Acc. Ins. Co., supra.* However, such an approach has little value in the present case, where the contract expressly states that the insurers "shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured . . . ". Under the terms of the present contract, rather than an obligation to defend against claims, the insurers have "the right and shall be given the opportunity" to involve themselves in the defense of claims that may affect their interests. In such event, their only obligation is to "cooperate" in the defense of claims against the insured.

The ultimate issue herein is whether the insured is entitled to coverage for claims that allegedly continue to be filed and for reimbursement of funds already expended in payment of claims against it, i.e., whether it

is entitled to protection and restoration of its assets. In this context, and where there is no duty to defend, the fact that claims have been filed in numerous jurisdictions, and the fact that performance under the contract has no geographical limitations, are largely irrelevant.

Essentially, the only performance by the insurers that is called for by the contract is to pay, to the "Assured which sustains the loss", all sums for which that insured becomes liable as a result of the occurrences covered in the contract. Thus, the true subject matter of the contract is the protection of the assets of each individual insured. The risk insured against for B&W is not the risk of claims being made against B&W, but the risk of claims being paid for by B&W and the resulting depletion of its assets. Therefore, the principal location of the insured risk insofar as B&W is concerned is the principal location of that insured's assets – Ohio.

Application of Section 193

Defendants assert that Section 193 should not be applied in the present case because the Supreme Court of Ohio has implicitly rejected application of Section 193 in *Ferrin, supra*. However, the court finds no support for this contention in that case. There is simply no basis for defendants' claim that the Supreme Court of Ohio "passed over the opportunity" to adopt Section 193 in *Ferrin* by virtue of its application therein of Section 188 to determining the governing law for a contract of liability insurance. There is no mention of Section 193 in that case, no indication that the parties ever raised the issue of its applicability, and not even so much as a hint that the court considered it in any way. As B&W aptly points out,

there would have been no need in *Ferrin* to consider the applicability of Section 193, as the same result would have been reached in that case through application of either Section 193 or Section 188.

Defendants further contend that no Ohio court has as yet applied or followed Section 193. This contention is also without merit. While the appellate court in *General Accident Ins., supra,* decided the choice of law issue under the principles of Section 188, it did so because of the particular facts of that case, i.e., there was no principal location of the insured risk. Although the court rejected the contention that Maryland law should be held to be controlling under Section 193, there was no objection to nor rejection of Section 193 in principle. Indeed, the court's language and analysis makes it clear that it actually *followed* Section 193 in determining the governing law in that case. After quoting extensively from Section 193 and Section 188, and then stating that it was "[a]pplying the foregoing", the court determined whether or not there was a principal location of the insured risk and, having found none, turned to an analysis under the more general principles of Section 188. The court's analysis was thus in accordance with the precepts of Section 193, Comment *a.*

Next, defendants argue that, even if Ohio courts would follow Section 193, it is inapplicable to the present case by its own terms. Defendants point out that Section 193 requires that there be 1) a principal location of the insured risk; 2) an understanding between the parties as to the principal location of the insured risk; and 3) no other state with a more significant relationship to the transaction and the parties under the principles stated in Section 6.

We have already determined that there is a principal location of the insured risk insofar as B&W is concerned, and that is Ohio. The question of whether Louisiana has a more significant relationship to the transaction and the parties with respect to the contested issue will be discussed more fully *infra;* for present purposes, however, we state our conclusion that Louisiana does not have the more significant relationship under the principles stated in Section 6.

As for the remaining factor, the understanding of the parties as to the principal location of the insured risk, defendants err in regarding this as requiring, in effect, a mutual understanding that is tantamount to an express agreement on the issue. Virtually identical language in Comment *c* to Section 193 and Comment *e* to Section 188 shows that the understanding spoken of is to be loosely construed: " . . . it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the risk is to be principally located would be applied to determine many of the issues arising under the contract." Restatement (Second) of Conflict of Laws, Section 193, Comment *c.*

Defendants also take issue with Comment *f* to Section 193, regarding multiple risk policies. Defendants claim that the "divide the risks" approach to such policies of Comment *f,* which suggests that the law of the principal location of each individual insured risk should control in the determination of insurance disputes regarding that risk, would violate the principles of Section 6 regarding consideration for certainty, predictability, and uniformity of result, and the justified expectations of the parties in

that regard. A similar viewpoint is expressed in dicta in *Westinghouse Electric Corp. v. Liberty Mutual Ins. Co.*, 559 A.2d 435 (N.J.Super.A.D. 1989), upon which defendants primarily rely:

> * * * [W]hen comprehensive nationwide coverage is purchased, it is surely the expectation of both insured and insurer that what the insurer has bought and what the insurer has sold is a single protection from liability irrespective of the particular state law under which that liability is determined so long as the risk, whether or not ultimately resulting in liability, is within the policy coverage. * * * In our view, the notion that the insured's rights under a single policy vary from state to atate [sic] state depending on the state in which the claim invoking the coverage arose contradicts not only the reasonable expectations of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict of law terms, to suggest that more than one body of law will apply to a single contract. The theme running through the federal mega-coverage cases is the assumption not only that state law will determine whose insurance law will govern the coverage dispute but also that it will be a single state's law chosen in accordance with applicable conflict principles of the forum. * * *

Id. at 442. Defendants cite a handful of federal district court cases that have cited this language from *Westinghouse* in reaching similar conclusions. See *Potomac Electric Power Co. v. California Union Ins. Co.*, 777 F.Supp. 968 (D.D.C. 1991); *National Starch and Chemical Corp. v. Great American Ins. Co.*, 743 F.Supp. 318 (D.N.J. 1990); *CPC*

International, Inc. v. Northbrook Excess & Surplus Ins. Co., 739 F. Supp. 710 (D.R.I. 1990).

The relevance of these cases to the present action is questionable, in that B&W is not advocating the application of the laws of numerous states depending on where the claims arose, which is at the heart of the controversy in these cases. Rather, B&W's argument is consistent with their rulings in its emphasis on the application of the law of a single state, and in its assertion that the law of the insured's principal place of business, i.e., the principal location of the insured risk, be applied.

Furthermore, defendants' reliance on *Westinghouse* in support of this argument is also questionable, as the same appellate court that decided *Westinghouse* later criticized and rejected its reasoning. See *Johnson Matthey Inc. v. Pennsylvania Manufacturers' Assoc. Ins. Co.*, 593 A.2d 367 (N.J.Super.A.A. [sic] 1991); *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Assoc. Ins. Co.*, 603 A.2d 61 (N.J.Super.A.D. 1992). As stated by the court:

> In *Johnson Matthey*, we explained our disagreement with *Westinghouse*. In short, we concluded that nationwide uniformity of policy interpretation was an illusory goal, not truly achievable or necessarily preferable. If it is associated with the place of contract, it is associated with an arbitrary and usually irrelevant choice which [section] 193 of the *Restatement* discards. Site-specific uniformity, on the other hand, is achievable, and represents a choice of the law of the jurisdiction that is most concerned with the outcome.

Gilbert Spruance, supra, at 64. The court went on to make the following observation, which is most pertinent to the present claim of concern for certainty, predictability, and uniformity of result:

> If the parties to an insurance contract truly prize uniform interpretation of multistate insurance policy language, they can frequently achieve it by expressing a choice of law in the contract. * * * Their failure to express such a choice tends to show that uniform interpretation was not a conscious goal of the contracting parties.

Id. at 64-65.

In any event, there is little danger of nonuniform interpretation of the contract through application of Comment *f* of Section 193 in the present case, as we have already rejected the contention that the place of the insured risk in the present case is wherever the claims arose. Comment *f* is useful and relevant for our present purposes insofar as it lends support for a separate consideration of B&W's insurance coverage apart from that of the parent corporation and the other subsidiaries. Such an approach is entirely consistent with – and all but expressly called for by – the terms of the contract itself, which throughout treats B&W separately and individually, while for the most part treating the remaining insureds collectively.

Defendants point out that in *Westinghouse,* et al, it is the law of the principal place of business of the corporate parent that is held to be controlling. To the extent that this is accurate, however, it appears to be the result of coincidence, reached through the requisite case-by-case weighing of all relevant factors, rather than the result of a

determination as a matter of law that the law of the principal place of business of the corporate parent is controlling in a dispute between its corporate subsidiary and their common insurer. Under the present facts and circumstances, B&W is better regarded as the separate corporation that it is, and McDermott, its corporate parent, is better regarded merely as B&W's agent for purposes of procuring its individualized insurance policy.

The court finds plaintiff's analysis of the question of whether Ohio courts would adopt and follow Section 193 to be persuasive. There is no inherent conflict between Section 193 and Sections 6 and 188. Rather, under the scheme of the Restatement (Second), Sections 189 through 197 are essentially subsections of Section 188, and act as models for the application of the principles of Section 188 to particular types of contracts:

> * * * These contracts are given special attention because it is considered possible to state with respect to each that, in the absence of an effective choice of law by the parties, a particular contact plays an especially important role in the determination of the state of the applicable law. * * *

Introductory Note to Title B of Chapter Eight, Restatement (Second) of Conflict of Laws. Where Section 6 states general principles applicable to all issues of choice of law, and Section 188 states general principles applicable to choice of law issues regarding contracts, Sections 189-197 state specific principles applicable to particular types of contracts. Thus, these sections together form a continuous and harmonious scheme for the analysis of choice of law questions regarding contract disputes.

The court can find no justification for concluding that Ohio courts, having adopted Sections 6 and 188, would reject the application of their integrally related subsections if faced with factual situations where they would be applicable. The court therefore finds that Ohio courts would adopt and apply Section 193 under the facts of the present case.

Analysis Under Sections 6 and 188

Even if Ohio courts would for some reason reject the application of Section 193 under the present facts, an analysis of these facts under Sections 6 and 188 yields the same result – that Ohio law should control the resolution of the present dispute.

Of the factors listed in Section 6, the most pertinent to the present inquiry are subsections (2)(b) and (c), which prescribe an examination and balancing of the relative policies of the forum state and other interested states in the determination of the issue in dispute. Comment *f* to Section 6 states that "In general, it is fitting that the state whose interests are most deeply affected should have its local law applied." While Ohio's interests in the resolution of this dispute are substantial, Defendants fail to present any correspondingly significant interests on the part of Louisiana that would compel the application of its law.

As established earlier, subsections (2)(d) and (f), regarding the expectations of the parties and the uniformity of result, are of little weight in the present case.

Under subsection (2)(g), the court should take into consideration the ease in determination and application of the law to be applied. The court has not had the benefit of any analyses or arguments regarding the ultimate issue of the construction under Ohio and Louisiana law of the term "occurrence". A preliminary inquiry, however, indicates that neither state has as yet definitively ruled on this issue. Since the courts in Louisiana are apparently in conflict, see 64 ALR4th 668, the determination of Louisiana law on this issue poses some difficulties. We have found no Ohio cases that have directly addressed the present issue, although at least one Ohio appellate court has adopted the general principle that the term "occurrence" in a liability insurance contract should be construed broadly and liberally in favor of extending coverage to the insured. *Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co.* (1984), 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227. Although this in itself is not conclusive of Ohio law on this issue, it is persuasive precedent. Thus, the factor of the ease of determination of the law to be applied tends to favor Ohio.

Turning to the more specific factors listed in Section 188, we find that these also favor application of Ohio law. Of greatest significance is subsection (d), the location of the subject matter of the contract. Comment *e* to Section 188 makes it clear that the "subject matter" of the contract is equated with the "insured risk", in accord with the principles of Section 193.

Subsection (e) lends futher [sic] support to the conclusion that Ohio is the state with the more significant contacts. None of the defendant insurers has any significant contact with either Louisiana or Ohio in terms of

domicile, residence, place of incorporation, or principal place of business, although most of the insurers are authorized to conduct insurance activities in both states. While B&W's place of incorporation is Delaware, and while it maintains a nominal residence in Louisiana, its domicile, principal residence, and principal place of business is in Ohio.

As used in the Restatement, "the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect . . . ". Comment *e* to Section 188, Restatement (Second) of Conflict of Laws. Assuming, as defendants suggest, that the ultimate delivery of the contract to McDermott in Louisiana was the last act necessary to make the contract binding, then Louisiana would be the place of contracting. However, Comment *e* to Section 188 places this factor in proper perspective:

> Standing alone, the place of contracting is a relatively insignificant contact. To be sure, in the absence of an effective choice of law by the parties, issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will

> often be the state of the parties' common domicil [sic] as well. By way of contrast, the palce [sic] of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.

While Ohio may still adhere in theory to the general principle that the law of the state where the contract is made governs interpretation of the contract, see *Ferrin, supra,* at 44, the adoption of Section 188 dictates that this general principle is applicable only when no other significant factors outweigh the place of contracting. Such is not the case here.

In the present case, assuming that Louisiana is the place of contracting, this factor stands alone as the only significant contact with Louisiana. There is no common domicile between B&W and any of the defendants. Although some consultations regarding negotiations may have taken place between McDermott in Louisiana and Adams & Porter in Texas, negotiations were conducted primarily in states and fora other than Louisiana or Ohio. Comment *e* makes it clear that, under such circumstances, the place of negotiations is likewise of little significance:

> The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and the agreement reached. This contact is of less importance when there is no one single place of negotiation

> and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.

Lastly, the place of performance, subsection (c) to Section 188, is of no bearing in the present case. The only performance at issue herein is defendants' duty to pay B&W under the terms of the contract. In this day of computerized banking and electronic transfers, the place where payment is to be made or received is of little, if any, real significance.

In sum, an analysis of the present facts under Sections 6 and 188 leads to the conclusion that Ohio is the state with the more significant contacts, and that Ohio law should control the resolution of the present dispute.

Constitutionality of Applying Ohio Law

Defendants' final objection to the application of Ohio law is that it would be unconstitutional, because Ohio allegedly has no " . . . significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Based on our analysis above, the court finds no merit in this contention.

CONCLUSION

The court finds that Ohio is the state with the more significant contacts with the parties and issues raised in the present case, and that therefore Ohio law will be applied.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
U. S. DISTRICT JUDGE

Nos. 93-4149/4150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE BABCOCK & WILCOX COMPANY, Plaintiff-Appellant/ Cross-Appellee, v. ARKWRIGHT-BOSTON MFG. MUTUAL INSURANCE COMPANY, ET AL., Defendants-Appellees/ Cross-Appellants, CREOLE INSURANCE COMPANY, LTD., Defendant-Appellant/ Cross-Appellee, MCDERMOTT, INC., Third Party Defendant Appellant/Cross-Appellee	ORDER (Filed Aug. 4, 1995)

BEFORE: KENNEDY and NORRIS, Circuit Judges; and TAYLOR,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

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* Hon. Anna Diggs Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

Mr. Peter J. Kalis
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

PETITIONS FOR CERTIORARI RAISING QUESTIONS ABOUT THE DETERMINATION OF STATE LAW UNDER ERIE R.R. CO. V. TOMPKINS

Windham v. First Gibraltar Bank FSB, No. 95-195, *cert. pending*

National Fid. Life Ins. Co. v. Chadima, No. 95-166, *cert. denied*, 1995 WL 455033 (U.S. Oct. 2, 1995)

Transcraft Corp. v. Liberty Mut. Ins. Co., No. 94-1597, *cert. denied*, 115 S. Ct. 1990 (1995)

Joslyn Mfg. Co. v. Liberty Mut. Ins. Co., No. 94-978, *cert. denied*, 115 S. Ct. 935 (1995)

Richards v. Michelin Tire Corp., No. 94-906, *cert. denied*, 115 S. Ct. 902 (1995)

Murray v. National Broadcasting Co., No. 94-866, *cert. denied*, 115 S. Ct. 734 (1995)

Chicago Bd. of Educ. v. Affiliated FM Ins. Co., No. 94-436, *cert. denied*, 115 S. Ct. 425 (1994)

General Elec. Capital Corp. v. National Union Fire Ins. Co., No. 94-58, *cert. denied*, 115 S. Ct. 293 (1994)

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Bezanson v. Metropolitan Ins. & Annuity Co., No. 91-1727, *cert. denied*, 505 U.S. 1205 (1992)

Rally's Inc. v. International Shortstop Inc., No. 91-824, *cert. denied*, 502 U.S. 1059 (1992)

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Mendel v. Silver, No. 89-1645, *cert. denied*, 496 U.S. 926 (1990)

Southwest Forest Indus. Inc. v. Sutton, No. 89-1165, *cert. denied*, 494 U.S. 1017 (1990)

Hearn v. State Farm Mut. Auto. Ins. Co., No. 89-221, *cert. denied*, 493 U.S. 855 (1989)

Borden Inc. v. Affiliated FM Ins. Co., No. 88-1986, *cert. denied*, 493 U.S. 817 (1989)

Nemours Found. v. Pierce Assocs. Inc., No. 88-1790, *cert. denied*, 492 U.S. 907 (1989)

Marine Bank of Springfield v. Hendrickson, No. 87-1977, *cert. denied*, 488 U.S. 822 (1988)

Suggs v. State Farm Fire & Casualty Co., No. 87-1536, *cert. denied*, 486 U.S. 1007 (1988)

Honeywell Inc. v. Luzzader, No. 87-1524, *cert. denied*, 485 U.S. 1035 (1988)

Loengard v. Santa Fe Indus. Inc., No. 87-1504, *cert. denied*, 485 U.S. 1034 (1988)

Devon Bank v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 87-1426, *cert. denied*, 485 U.S. 1008 (1988)

Aloe Coal Co. v. Clark Equipment Co., No. 87-182, *cert. denied*, 484 U.S. 853 (1987)

Wilson v. Pogo Producing Co., No. 84-1390, *cert. denied*, 471 U.S. 1054 (1985)

Shell Oil Co. v. Williams, No. 82-692, *cert. denied*, 459 U.S. 1087 (1982)

Aetna Casualty & Sur. Co. v. Porter, No. 81-200, *cert. denied*, 455 U.S. 1009 (1982)

Travelers Ins. Co. v. Fenasci, No. 81-545, *cert. denied*, 454 U.S. 1123 (1981)

Ortho Pharmaceutical Corp. v. McKenna, No. 80-308, *cert. denied*, 449 U.S. 976 (1980)

Vagle v. Picklands Mather & Co., No. 79-773, *cert. denied*, 444 U.S. 1033 (1980)

Ranger Ins. Co. v. Culberson, No. 71-1365, *cert. denied*, 407 U.S. 916 (1972)

No. 95-706

Supreme Court, U.S.
FILED
JAN 8 1996

In The

Supreme Court of the United States

October Term, 1995

THE BABCOCK & WILCOX COMPANY, *et al.*,

Petitioners,

v.

ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; CARYL VAUGHN GIBBS, INDIVIDUALLY AND ON BEHALF OF CERTAIN UNDERWRITERS OF LLOYDS OF LONDON; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.; INSURANCE COMPANY OF NORTH AMERICA (UK), LTD.; AND C.A. PARR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESTATED QUESTIONS PRESENTED

Respondents strongly disagree with the questions presented as framed by Petitioners. In fact, Respondents believe that no questions worthy of this Court's review have been raised by the lower court rulings. However, Respondents would pose the questions presented by Petitioners as follows:

1. Did the district court correctly grant, and circuit court correctly affirm, summary judgment for the Respondent Insurers where Petitioners were put to the affirmative burden of proving that one "event" took place during the policy period and failed to do so?

2. Did the circuit court correctly disregard the state intermediate appellate court authority relied upon by Petitioners as irrelevant because it involved vastly different policy language?

PARTIES TO THE PROCEEDING AND AFFILIATIONS

Respondent St. Paul Mercury Insurance Company is a wholly-owned subsidiary of St. Paul Fire & Marine Insurance Company which is in turn a wholly-subsidiary of the St. Paul Companies, Inc., a publicly-owned corporation.

Respondent Arkwright-Boston Manufacturing Mutual Insurance Company is a member of an insurance pool managed by the Mutual Marine Office, Inc. Arkwright-Boston's interest is now owned by Arkwright Mutual Insurance Company. It is not publicly traded or a subsidiary of a publicly-owned company. The interests of some former members of the pool have been transferred to New York Marine & General Insurance Company. New York Marine & General Insurance Company and the Mutual Marine Office, Inc., the pool manager, are wholly-owned subsidiaries of NY Magic, Inc., a publicly-owned corporation.

Respondent Insurance Company of North America (U.K.) Limited is a wholly-owned subsidiary of CIGNA G.B. Limited whose ultimate holding company is CIGNA Corporation, a publicly-owned corporation.

Respondent C.A. Parr (Agencies), Ltd. is a wholly-owned subsidiary of Nelson Hurst plc., a publicly-owned corporation organized under the laws of Great Britain.

Respondent Caryl Vaughn Gibbs, individually and as representative of certain Underwriters at Lloyd's, London, is an individual with no relevant corporate affiliation. Respondents certain Underwriters at Lloyd's,

PARTIES TO THE PROCEEDING AND AFFILIATIONS – Continued

London, are also individuals with no relevant corporate affiliation.

Respondent Indemnity and Marine Assurance Company, Ltd. is a subsidiary of Commercial Union, plc., a publicly-owned corporation organized under the laws of Great Britain.

Respondents American Home Assurance Company and American International Marine Agency are wholly-owned subsidiaries of the American International Group which is a publicly-owned corporation.

Respondent Allianz Insurance Company is not a subsidiary or affiliate of any publicly-owned corporation.

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PROCEDURAL RULE INVOLVED

In addition to the rule cited by Petitioners the following is relevant:

Fed. R. Civ. P. 56. Summary Judgment

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

I. Introduction

This case involves the application of the language of a policy of insurance that both the district court and the Sixth Circuit Court of Appeals have found to be clear and unambiguous, to an essentially undisputed set of facts,[1] an issue that is exclusively one of state law.

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[1] The Court will note that nowhere in Petitioners' submission is any allegation that an issue of material fact exists.

The basis of the dispute at the district, circuit and now Supreme Court levels has been Petitioners'[2] steadfast refusal to accept the language of the policy as written, and their continued insistence that the policy be interpreted consistent with language that is not in the policy, and cases construing such language.

Petitioner B&W sought insurance coverage for thousands of asbestos bodily injury claims under an excess liability insurance policy subscribed to by a number of insurers including Respondents[3] ("the subscriber

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Instead, Petitioners claim they were prevented, in some unidentified manner, from presenting evidence at both the trial and appellate level that would raise an issue of material fact.

[2] "Petitioners" collectively refers to Petitioner Babcock & Wilcox Co., ("B&W") an additional named insured on the policy at issue; Petitioner McDermott, Inc. ("McDermott") the corporate parent of B&W, the named insured under the policy at issue, and the entity responsible, along with its broker, for negotiating and obtaining the policy at issue; and Petitioner Creole Insurance Co. Ltd. ("Creole") a subsidiary and captive insurer of McDermott and sister company of B&W which insured $500,000, on a non-aggregate basis, of the $2.5 million underlying the policy at issue. Creole was added as a party defendant in response to a motion to dismiss for failure to join an indispensable party, and McDermott was impleaded by the certain defendant insurers.

[3] Respondents are St. Paul Mercury Insurance Co., Arkwright-Boston Manufacturing Mutual Co., Allianz Insurance Co., American International Marine Agency, American Home Assurance Co. and London Market Insurers: Caryl Vaughn Gibbs, individually and as representative of certain Underwriters at Lloyd's, London, Marine Assurance Co., Ltd., Indemnity Marine Assurance Co. Ltd., Insurance Co. of North America (U.K.) Ltd., and C.A. Parr (Agencies) Ltd. (hereinafter "Respondents" or "Insurers").

policy"). The policy covers the insured's liability in excess of $2.5 miliion per "occurrence." It defines "occurrence" as "any happening or series of happenings, arising out of or due to one event taking place during the term of this contract * * * ." Individually, no asbestos claim against B&W exceeds $2.5 million, but collectively the claims total more than $2.5 million.

To exhaust underlying insurance and to invoke excess coverage under the subscriber policy, B&W adopted the theory that all the asbestos claims asserted against it arose from one "event" and, thus, from one "occurrence." The alleged causative "event" was B&W's business decision to use asbestos. B&W argued that because all the claims arose from one "event", and hence one "occurrence", its aggregated liability on all those claims exceeded $2.5 million and invoked coverage under the policy.

After completing two years of discovery, the parties filed cross-motions for summary judgment. The parties agreed there were no material fact disputes and the case should be resolved on summary judgment. Petitioners' App. 15-16.

Petitioners advanced a "one event-one occurrence" argument. In support of their own motion and in opposition to Petitioners' cross-motions, Respondents made two arguments. First, Respondents argued that Petitioners' "one event-one occurrence" theory was legally wrong because the relevant causative "event" was in fact each claimant's exposure to asbestos. Because there were multiple "events", and no single "event" (i.e. each claimant's exposure to asbestos) had resulted in liability exceeding $2.5 million, the Respondents' excess policy was not invoked. Second, Respondents argued that no coverage would exist under Petitioners' theory of the case because Petitioners had not shown what, if any, business decision

B&W had made during the policy period. Indeed, Petitioners admitted that B&W's business decision to use asbestos took place in the 1800s. Accordingly, Petitioners' own "one event-one occurrence" argument itself raised the question as to whether or not there had been any "occurrence" at all. Respondents argued they were entitled to summary judgment on either of these grounds.

Respondents' motion and their opposition to Petitioners' cross-motions put Petitioners to their burden of proving an "event" took place during the policy period, an element necessary to establish coverage. By presenting no evidence of any decision taking place during the policy period, Petitioners essentially ignored this necessary element, choosing instead to take the position that the "event" did not have to take place during the policy period, contrary to the plain language of the policy.

The district court, as a result, ordered summary judgment for the Respondent Insurers. Petitioners' App. 15-35. On appeal, the circuit court affirmed. Petitioners' App. 1-14.

There is no reason for this Court to review the lower courts' state law decisions concerning insurance coverage. Contrary to Petitioners' argument, the circuit court has not created a summary judgment procedural rule that is in conflict with other circuits or this Court's summary judgment precedent. Both of the lower courts merely applied existing summary judgment standards – standards that require a party to present evidence establishing or creating a genuine issue of fact as to any element upon which that party bears the burden of proof. The circuit court properly ruled that Petitioners had ample notice and opportunity to present evidence on the issue of whether the causative "event" giving rise to the claims for which B&W sought coverage took place during the

policy period. In fact, the record shows that Respondents argued to the district court at least 20 times that Petitioners' theory of the case would not establish any "event" during the policy period. Respondents' App. 78-86.

Although Petitioners have attempted to frame a procedural issue for this Court's review, it ignores the fact that the circuit court decided this case on more than one ground. The procedural issue raised by Petitioners – that it had no notice that the court would determine whether the causative event took place during the policy period – is not only meritless, but is likely moot. The circuit court also decided the case on another independent ground as well, ruling there were multiple occurrences, none of which would reach Respondents' layer of excess coverage. Petitioners attempt to attack this alternate basis of the circuit court's decision by claiming that the circuit court ignored this Court's rulings in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Commissioner of Internal Revenue Service v. Estate of Bosch*, 387 U.S. 456 (1967). However, that argument, as demonstrated below, is completely without merit, and therefore the Court would have no reason to consider the procedural question framed by Petitioners.

II. Factual Background and Proceedings Below

B&W sought indemnity for its asbestos liabilities under decades of umbrella and excess liability policies, including the subscriber policy in effect from April 1, 1979 to April 1, 1980. The subscriber policy is a manuscript policy that differs in many significant respects from B&W's excess insurance before and after the 1979-80 policy year. B&W and virtually all of its excess insurers providing coverage from 1950 to 1986 reached a settlement with respect to B&W's asbestos liabilities for all

policy years except 1979-80. B&W's insurers for those other years, including some of the same Insurers in this action, have paid out in excess of $300 million, and expect to pay significant sums in the future, to indemnify B&W for its asbestos liabilities under policies containing substantially different policy language.

The principal dispute considered below is the interpretation and application of the term "occurrence," which the subscriber policy defines as "any happening or series of happenings, arising out of or due to one event taking place during the term of this contract * * * ", to thousands of individual asbestos bodily injury claims asserted against B&W.

The insurers' duty to indemnify is invoked only where the insured's liability for any one occurrence exceeds $2.5 million. Specifically, the subscriber policy states there will always be a $2 million per occurrence *nonaggregate "buffer layer"*[4] below it, and the subscriber

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[4] "Buffer layer" is a term of art in the insurance industry meaning a usually self-insured layer between an underlying policy and the subject policy; in some circumstances it is used to provide an added layer of protection to the excess policy. The term "aggregate" refers to the maximum liability coverage available under a policy regardless of the number of occurrences. After such a policy's aggregate limit of liability has been paid, it is said to be exhausted, at which point responsibility for future payments may shift to a higher layer, dependent upon policy terms. If a policy contains no "aggregate" limit, then the policy has no maximum total liability. A "nonaggregate" buffer layer refers to a buffer layer that will always be in place regardless of the number of occurrences. Its "nonaggregate" limits can never become exhausted. Thus, the "nonaggregate" buffer layer of protection will always exist for every occurrence, regardless of the number of occurrences, and will always prevent the subscriber policy from assuming first dollar responsibility for a new occurrence.

policy does not respond until underlying primary coverage of $500,000 per occurrence, and in the aggregate, plus the $2 million nonaggregate "buffer layer" are exhausted. B&W's underlying primary coverage is exhausted. However, the $2 million nonaggregate "buffer layer", and a $500,000 non-aggregate policy issued by Petitioner Creole Insurance Company Ltd., B&W's sister company and Petitioner McDermott's captive insurer, are not.

Because of the existence of the "buffer layer", the issue of whether the thousands of individual asbestos bodily injury claims asserted against B&W represented multiple occurrences, as the Insurers contend, or a single occurrence as Petitioners contend, became paramount. The "buffer layer" applies to each occurrence, and the subscriber policy only responds to occurrences in excess of the $2 million dollar "buffer layer". Thus, as all of B&W's asbestos claims to date have been settled for less than $2 million each, such claims cannot reach the subscriber policy if each arose from a separate occurrence.

The parties conducted two years of discovery, taking over 40 depositions and producing thousands of documents. As the parties agreed that the material facts were undisputed, and the case was ripe for summary disposition, the district court, at the parties' request, established a simultaneous three-part briefing schedule for summary judgment.

The Insurers' theory of the case, as encapsulated in the following excerpt from their opening brief, and further amplified in subsequent memoranda, flatly contradicts Petitioners' "lack of notice" argument:

> Before resolving the "number of occurrences" under the subscriber policy, the underlying Creole policy and the "buffer layer", it is first necessary to determine what is the "occurrence" that is insured against. As a preliminary matter, it is

important to recognize that the definition of "occurrence" in the subscriber policy differs substantially from the language that has generally been construed by courts considering the "number of occurrences" issue, and that this manuscript definition has substantially different requirements for what constitutes an "occurrence" under the policy. . . .

An "occurrence", as defined in the subscriber policy, has three separate requirements. The first requirement under this definition is that there be a "happening or series of happenings." Clearly, this "happening" must be the injury or damage for which coverage is sought. As the subscriber policy is a third party liability policy, it is axiomatic that a prerequisite to coverage is injury or loss to a third person. Without such injury, there can be no occurrence. (Cite omitted).

The second requirement of the subscriber policy is that the happening or series of happenings arise out of or be due to one "event". The "event" is clearly the accident or fortuitous incident that gives rise to or causes the injury or damage for which the insured seeks coverage. In order to be insurable, an injury must arise from a fortuitous or unexpected event. (Cite omitted).

The final requirement of the subscriber policy's definition of "occurrence" is that the one "event" which gives rise to or causes the "happening", i.e., the injury, must "tak[e] place during the term of this contract". This clear and unambiguous additional third requirement of the subscriber policy differs from the "standard form" definition of "occurrence" that has been

> construed in many of the "number of occurrences" cases. Thus, if B&W is to have any coverage at all for its asbestos liabilities under the subscriber policy, it bears the burden of establishing that an "event" giving rise to a happening or series of happenings has taken place during the term of the contract. Since B&W's use of asbestos commenced over 100 years ago, it can hardly be characterized as an event taking place during the term of the contract. Moreover, even if B&W's use of asbestos during the 1979-80 policy year might conceivably be characterized as an "event", it would not be insurable due to the lack of any fortuity, based upon B&W's knowledge of the asbestos risk.[5] In short, the only plausible reading of the subscriber policy if B&W is to have any coverage for its asbestos liabilities under the policy is that the "event" is the exposure of each individual claimant to asbestos and that the "happening" is the injury that is sustained by the individual claimant.

R.615-617.[6]

Thus, contrary to Petitioners' claim of "ambush" the issue of what must take place during the policy period in order to invoke the Insurers' duty of indemnity, the so-called "trigger of coverage" issue, was squarely addressed in the Insurers' opening brief. Insurers' argument and evidence unequivocally put Petitioners to their

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[5] The record below clearly established that B&W began phasing out the use of asbestos in 1972 due to its propensity to cause bodily injury. Petitioners' App. 18-19.

[6] Citations to R. page ___ are references to the Joint Appendix provided to the circuit court. Respondents will gladly provide the Court with the Joint Appendix if the Court so desires.

burden of proving an essential element of their case – that an "event" took place during the policy period.

B&W, on the other hand, completely ignored the "trigger" language of the occurrence definition in its opening brief:

> The definition [of occurrence] has two prongs: (1) an effect ("any happening or series of happenings") which (2) arises from a cause ("one event"). "Happening" refers to the harm that B&W is indemnified against in the policy – personal injury and property damage. "Event" refers to the tortious act which ultimately causes the personal injury or property damage. "[S]eries of happenings" indicates that the personal injury or property damage can be multiple instances of liability. (Cite omitted).
>
> Thus, under the plain meaning of the occurrence definition, occurrences associated with multiple instances of personal injury or property damage are determined by the number of causes or events. If multiple instances of personal injury or property damage (series of happenings) arise from one cause (event), there is one occurrence. Here, B&W's third party asbestos-related personal injury claims constitute a series of happenings arising out of one event – specification of asbestos-containing components in the design, fabrication, assembly, and servicing of boilers. (Cite omitted). This event is the cause of each asbestos-related personal injury claim filed against B&W. Because the liability for this event far exceeds $2.5 million, B&W is entitled to coverage under the Subscriber Policy.[FN]
>
> FN At this point, proof of B&W's prima facie case is complete because the parties agree that (1) B&W is a named insured to the Subscriber Policy; (2) the Subscriber Policy was subscribed to by the Defendants; (3)

> the Subscriber Policy was delivered to and accepted by or on behalf of B&W; (4) a $1 million premium was paid to the Subscribers; (5) the asbestos-related claims arise from liabilities imposed upon B&W by courts and/or under settlement agreements; (6) the asbestos-related claims involve personal injuries, which are alleged to have occurred in part or in whole, during the policy period, April 1, 1979 to April 1, 1980.

R. 533-534.

Based upon the foregoing excerpts, it is clear, and both the district and circuit courts noted, that B&W and the Insurers were in agreement that the "happening" in the occurrence definition equated with the injury for which coverage was sought, and the "event" was the cause of the injury. The parties, however, differed on what the "event" was that caused the asbestos bodily injuries for which B&W sought coverage.

Moreover, despite B&W's position that "event" as used in the occurrence definition is the cause of injury, B&W refused, or was unable, to address the clear requirement that the cause of the injury take place during the policy period. This was undoubtedly because the causal "event" under B&W's theory of the case, its decision to use or specify asbestos in its boilers, undisputedly took place in the late 1800's. Petitioners' App. 17. Instead, B&W argued that the injury, not the cause, must take place during the policy period and attempted to support its position by citing cases dealing with a materially different definition of occurrence, a definition that looked specifically to the time of the injury, rather than the cause, as the trigger of coverage.

The Insurers pointed out the flaw in B&W's theory in their brief in opposition, stating:

> In order to recover under the subscriber policy, B&W bears the burden of proving that all underlying layers, including the $2 million non-aggregate "buffer layer" have been exhausted and thereafter, proving the three elements of the subscriber policy's definition of "occurrence":
>
> 1. There must be a "happening or series of happenings";
> 2. The happening or series of happenings must arise out of or be due to one "event"; and
> 3. The event must "tak[e] place during the term of this contract", i.e. April 1, 1979 to April 1, 1980.
>
> The parties agree that the first element – the "happening or series of happenings" element – refers to the injury or series of injuries that arise from the event.
>
> The parties further agree that the second element of the "occurrence" definition – that the injuries arise out of or be due to one "event" – refers to the cause of the injury. The parties disagree as to what is the relevant casual "event".
>
> * * *
>
> B&W's opening brief wholly fails to address the third element of the subscriber policy's definition of "occurrence" – the requirement that the "event" (i.e. the cause of the injury) "tak[e] place" during the April 1, 1979 and April 1, 1980 policy period. The standard CGL policies at issue in many of the cases relied upon by B&W (citations omitted) included "one occurrence" conditions and did not require the insured to prove this third element. Rather than requiring that the cause of the injury take place during the

> term of the policy, as does the subscriber policy, the policies interpreted in B&W's legal authority required that the result, the injury itself, take place during its term. (Footnote omitted).
>
> * * *
>
> It is undisputed that B&W's business decision to manufacture boilers with asbestos-containing components and to specify asbestos as an insulator dates back over 100 years. It did not "tak[e] place" during the 1979-80 policy period. Thus, B&W's argument that its business decision to manufacture boilers with asbestos is the relevant "event" would not invoke coverage under the subscriber policy.

R. 1668-1672.

Inexplicably, B&W's brief in opposition did not address the requirement of the occurrence definition that the causative "event" must take place during the policy period to invoke coverage, despite the fact that it was the linchpin of Insurers' analysis of the occurrence definition in their opening brief. In fact, the only portion of B&W's brief that could possibly be construed as dealing with the issue is a single conclusory sentence in the 15-page document, "Because this underlying act [B&W's decision to place asbestos containing boilers in the stream of commence] took place, in part, during the 1979-80 policy period, B&W's asbestos-related liability should be viewed as one occurrence." R. 1631. B&W provided no evidence or analysis to support this statement. B&W did not attempt to establish any evidence of a decision during the policy period, or that the claims for which it sought coverage were causally linked to such a decision.

In their closing brief, Insurers addressed Petitioners' failure of proof:

> Thus, under the definition of occurrence contained in the subscriber policy, B&W carries the

burden of showing that the asbestos losses for which it seeks coverage arise out of:

1. A "happening or series of happenings", *i.e.*, an injury or series of injuries;
2. The injury or series of injuries arise out of or are due to "one event"; and
3. The event giving rise to the injury or series of injuries has "tak[en] place during the term of this contract", *i.e.*, April 1, 1979 to April 1, 1980.

Despite this heavy burden, B&W makes only the conclusory statement that the only reasonable interpretation of event is its decision to place boilers containing asbestos into the stream of commerce. It makes no attempt to show how this so-called "event" gave rise to the claims for which it seeks recovery under the policy. Just as significantly, B&W makes no attempt to show how this so-called "event" took place during the term of the contract. B&W has failed to articulate any clear explanation as to these points, and in fact, none exist.

B&W apparently would have the Court believe that its "business decision" to place into stream of commerce more than 10,000 boilers of various types and sizes over the course of more than a century was a singular, monolithic, and static one. B&W does not explain how one decision could encompass over one hundred years. In fact, a decision, as commonly understood, is not an ongoing process, but instead in the end point of a "decision making" process, a point that is fixed in time and place. (Footnotes omitted). B&W's implicit argument that its "business decision" was a singular one encompassing over one hundred years is further undermined by the testimony of Marcia Dilling, its corporate representative concerning its asbestos-based liability.

According to Dilling, B&W's asbestos losses arise from its design, manufacture and sale of many types of boilers which incorporate many types of asbestos-containing components, and additionally, from its specification of asbestos as an insulator. (See Subscribers' Opening Brief on Number of Occurrences, at 14-15.) It is clear from the record that B&W made a number of decisions with respect to its use of asbestos. Indeed, the record clearly shows in 1972, based upon its knowledge of the hazards of asbestos, B&W stopped using or recommending the use of asbestos as an insulator, and made a number of subsequent decisions to stop using or recommending the use of various asbestos-containing components. Thus, B&W has failed to sustain its burden of proving that its asbestos-based liability arises out of or is due to "one event". If, in fact, B&W's decision to place asbestos-containing products in the stream of commerce is, "one event" under the policy, then that decision was reached, by B&W's own admission, in the mid-19th century, and does not meet the clear and unambiguous requirement of the subscriber policy that the event "tak[e] place" during the term of the policy. B&W has failed to establish what, if any, causative "business decision" it made during the term of the policy. Even if B&W could point to a decision during the term of the policy, any coverage under the policy would be limited to injuries arising out of or due to that decision. Thus, subscribers could be held liable only for injuries arising from boilers constructed during the 1979-80 policy period. B&W has not demonstrated how, if at all, the claims for which it seeks coverage arose from any decision it made during the policy period. Moreover, any decisions made after its

> admitted knowledge of the hazards of asbestos in 1972 were not fortuitous and insurable events.

R. 1716-1719.

In its closing brief, B&W made its only real, albeit half-hearted and conclusory, attempt to deal with the requirement that the causative "event" take place during the policy period:

> Defendants' second argument that the "event" cannot be B&W's long history of specifying and using asbestos as a component and/or as an insulator in boilers is untenable. A good example that a causal event may be gradual or continuous is *Prudential Lines, Inc. v. American S.S. Owners Mut. Protection and Indem. Ass'n*, Nos. 86-11773, 90-6830A, 1992 W.L. 368479 (Bankr. S.D.N.Y. Dec. 10, 1992) . . . There, more than 40 years of marine protection and indemnity insurance policies, all of which did not define occurrence, covered the insured's liabilities arising from one continuous cause – the continuing presence of asbestos on the insured's ships. *Id.* at 12.
>
> Defendants' second argument also seeks to confuse the Court about trigger of coverage. The parties stipulated that the claims for which B&W seeks reimbursement involve injuries which are alleged to have taken place, in part, during the 1979-80 policy period. Stipulated Facts at 9-10, 6. It is also undisputed that the specification and use of asbestos took place, in part, during the policy period. Therefore, whether the Subscriber Policy required some form of injury (exposure, exposure-in-residence, manifestation) and/or a causal event to take place during the policy period is a moot issue. Both occurred during the policy period. Accordingly, like all of B&W's other excess insurers, the

> Subscribers should pay their pro rata portion of B&W's asbestos-related liability. *See*, Stipulated Facts at 10, ¶ 10.

Once again, B&W made only the conclusory statement that "specification" of asbestos took place during the policy period. B&W made no attempt to support its statement with record evidence. More importantly, it made no attempt to establish a causal link between the asbestos injuries for which it sought coverage and the alleged "specification" of asbestos during the 1979-80 policy period, a showing it had to make to meet its burden of proving coverage under the policy.

This excerpt also completely undermines Petitioners' argument that they were "ambushed" by the "trigger of coverage" issue. In fact, this portion of B&W's reply brief is the only place in all of the extensive briefing on the cross-motions for summary judgment where the term "trigger of coverage" is used. Because "trigger of coverage" is something of a term of art in the insurance industry, the Insurers had eschewed the use of the term, instead explicitly spelling out the concept in support of their argument, rather than resorting to the use of a term with which the court might not be familiar. However, B&W's use of the term makes it clear that B&W was completely aware that the issue had been raised.[7]

The court set aside three hours of oral argument for the parties to present their respective positions. From the hearing transcript which is attached as an appendix, it is clear that B&W was aware that "trigger of coverage" had been placed at issue. Respondents' App. 8-9.

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[7] It is worthy of note that Petitioners made the same "ambush" argument to the Court of Appeals but conveniently omitted its Reply Brief containing this excerpt from the Joint Appendix, which is why no Record Reference appears after this excerpt.

During oral argument B&W attempted to deal with the trigger issue through the "phantom comma" theory dismissed by both the district and circuit courts. Respondents' App. 8-9; Petitioners' App. 7, 27. It then argued that the occurrence language did not require the causative "event" to take place during the policy period, a position also rejected by both the district and circuit courts as contrary to the clear language of the policy. Petitioners' App. 7, 26-30. Finally, B&W again argued that its business decision was a continuing one that took place in part, during the policy period. B&W again failed to provide any evidence of a business decision during the policy period, or how the alleged business decision in 1979-80 was causally linked to the asbestos claims for which it sought coverage. Respondents' App. 8-9, *passim*.

In its decision, the district court, after reciting the facts and providing an extensive analysis of the summary judgment standard as articulated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), agreed with the position taken by the Insurers. Petitioners' App. 15-35.

The district court found that the language of the policy clearly required the causative "event", and not the resultant injury or "happening" to take place during the policy period. Petitioners App. 26-30. Having so found, the district court assumed, *arguendo*, that B&W's "business decision" theory of the causative event was correct, and searched the record for evidence of a business decision during the policy period that gave rise to the asbestos claims for which B&W sought coverage. Finding no such evidence, the district court concluded that B&W had failed to meet its burden of demonstrating coverage

under the policy at issue, and granted Insurers' motion for summary judgment. Petitioners' App. 30-35.

The Sixth Circuit Court of Appeals affirmed the district court's decision on two independent grounds. First, it agreed that under B&W's theory of the causative "event" there was no coverage because B&W had not presented any evidence of a business decision taking place during the policy period. The circuit court also rejected Petitioners' claim that they were not on notice that trigger of coverage was at issue to be unsupportable, as is clearly demonstrated by the foregoing excerpts from the district court briefing. Petitioners' App. 5-6.

The circuit court also went on to address the number of occurrences issue. The circuit court found in determining the number of occurrences under the occurrence language at issue one must look to the immediate cause of the injury and not a remote cause. Petitioners' App. 9-13. The circuit court found support for this position in case law dealing with a substantially similar definition of occurrence, and rejected the cases cited by Petitioners, as they dealt with a materially different occurrence definition. Petitioners App. 10-13. Applying the immediate cause test to the asbestos claims asserted against B&W, the circuit court found that the immediate cause of the injuries was each claimant's exposure to asbestos used in B&W boilers, and, as a result, each claim constituted a separate occurrence. The circuit court therefore found, on this alternate ground, that the district court properly granted summary judgment in favor of Insurers.

REASONS FOR DENYING THE PETITION

As the foregoing Statement of the Case clearly demonstrates, Petitioners' claim of lack of notice is specious. Indeed, the first question presented by Petitioners would be more properly phrased as: Can a policyholder in an

insurance coverage dispute make a strategic decision to completely ignore a policy requirement which constitutes a condition precedent to coverage, upon which it bears an affirmative burden of proof, and, by ignoring it, thereby preclude a court from granting summary judgment against the policyholder based upon the policyholder's failure to meet its burden of proof on that issue? The answer based upon this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) must be no.

Petitioners' second question presented is also specious. The authority that Petitioners claim is relevant and should have been considered by the circuit court in an *Erie* analysis was in fact considered by both the district and circuit courts and dismissed as irrelevant, as it dealt with materially different policy language. The circuit court instead based its ruling upon an analysis of the clear language of the policy and the undisputed factual record, an analysis consistent with the law of Ohio, and, in fact, the law of all of the states. The circuit court found support for its analysis in the only available decisions dealing with substantially similar policy language, and based upon that analysis found it must enter judgment against Petitioners.

I. The District Court's Ruling and Sixth Circuit's Affirmance Are Fully Supported By Fed. R. Civ. P. 56 and This Court's Decisions On The Summary Judgment Standard.

In an attempt to portray this matter as one worthy of this Court's review, Petitioners characterize the lower court decisions as radical departures from accepted jurisprudence that will wreak havoc if left uncorrected. They are nothing of the sort.

Petitioners' first step in this process is to overstate the holdings of a line of cases dealing with cross-motions

for summary judgment. Petitioners claim the cases stand for the proposition that "where cross-motions for summary judgment have been filed, one moving party's failure to establish its entitlement to judgment as a matter of law should not result in judgment in favor of the cross-movant". *See*, Petition for Writ of Certiorari at 9. What the cases actually hold is that cross-motions for summary judgment do not require a court to enter judgment as a matter of law to one side or the other. *Heublin, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). Nor should a Court construe cross-motions for summary judgment as establishing that there is no genuine issue of material fact. *LewRON Television, Inc. v. D.H. Overmayer Leasing Co.*, 401 F.2d 689, 692 (4th Cir. 1968). "Rather the Court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration". *Heublin*, 996 F.2d at 1461.

In this case, the district court held that Petitioners bore the burden of showing that the claims for which it sought coverage arose from an "event" taking place during the policy period. Petitioners' App. 32. The district court then searched the record for evidence that linked the asbestos claims asserted against B&W to an "event" during the policy period under B&W's theory of the case. The district court found *no* evidence to support B&W's position, much less evidence that would raise a genuine issue of material fact. The district court therefore properly, as required under Fed. R. Civ. P. 56(c)-(e), granted Insurers' cross-motion, as B&W had failed to meet its affirmative burden of proof. *Celotex*, 477 U.S. at 322-324.

Contrary to Petitioners' claim, Insurers' motion for summary judgment did not raise as its only issue the

number of occurrences. While that was clearly the ultimate issue addressed by all of the parties, a clear prerequisite to reaching the number of occurrences was establishing that any occurrence as defined by the policy had taken place. Further, inherent in establishing that an occurrence as defined by the policy had taken place was establishing an "event" during the policy period that would trigger coverage under the policy.

These points were clearly made by Insurers in their opening brief. R. 615-617. Moreover, under Ohio law the party seeking coverage bears the burden of proving a loss and demonstrating coverage under the policy. *Inland River Service Corp. v. Hartford Fire Insurance Co.*, 66 Ohio St. 32 (1981). With respect to an occurrence policy the policyholder's burden of demonstrating coverage includes establishing that the policy has been triggered. *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485, 1497 (S.D.N.Y. 1984), *aff'd in relevant part and modified in part*, 748 F.2d 760 (2d Cir. 1984).

In the courts below, Insurers' theory of case, as expressed in their opening brief, took into account the trigger element of the occurrence definition, and Insurers' theory was supported by record evidence. Insurers did not frame the trigger issue as a major point of contention as they did not, nor could they have reasonably been expected to, foresee that Petitioners would adopt a theory of the case that completely ignored a clear contractual prerequisite to coverage. By making a strategic decision to adopt a theory of the case that ignored the trigger requirement of the occurrence definition, an issue upon which they bore an affirmative burden of proof under the policy, the Petitioners themselves made trigger the pivotal issue in the case. Indeed, under Petitioners' theory of the case, the district court would have been placed in the

untenable position of determining the number of occurrences without any proof that there had, in fact, been a covered occurrence.

By ignoring an issue upon which they bore an affirmative burden of proof, Petitioner forced the trial court to rule against them. As this Court stated in *Celotex v. Catrett*:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. 322-323.

As Petitioners failed to establish an essential element of their case, the district court properly granted Insurers' motion for summary judgment and the circuit court properly affirmed.

Moreover, Petitioners made no attempt to rebut Insurers' theory of the case, which was fully supported by the policy language and the record evidence, as it was required to do under Fed R. Civ. P. 56(e). As the district court noted, Petitioners' only attempt to rebut Insurers' position was the statement, "that if the [occurrence definition] is not interpreted in [Petitioners'] favor, the [occurrence definition] must be ambiguous and unclear".

Petitioners' App. 28 citing Transcript at p. 9. The district court, of course, went on to find the occurrence definition clear and unambiguous and consistent with Insurers' interpretation.

Under Fed. R. Civ. P. 56(e), once Insurers had made a properly supported motion for summary judgment, Petitioners could not "rest upon the mere allegations or denials of [their] pleading, but [their] responses, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for trial". Fed. R. Civ. P. 56(e). Petitioners made no attempt to meet this burden, instead insisting through the course of briefing and oral argument that the occurrence language must be interpreted in a manner inconsistent with its clear and unambiguous terms.

Even now, Petitioners do not claim a material issue of fact exists, but instead claim that they were "ambushed" or prevented in some unspecified way from demonstrating a genuine issue of material fact.

Petitioners' claims that judgment against them was improper because of lack of notice are completely without merit. The language of the policy itself put Petitioners on notice of what was required to establish an occurrence under the policy. As the "trigger" concept is an integral part of the occurrence definition and must be established before the policy must respond for a claim, it was incumbent upon Petitioners to meet their burden of demonstrating a claim that would trigger coverage and thus give rise to an occurrence. *See, American Home Products, Corp., supra.* Then, and only then, could the "number of occurrences" issue be addressed.

In any event, Insurers' opening brief made clear their position that the occurrence language required the causative "event" giving rise to the injuries for which coverage

is sought must take place during the policy period. This position was repeated and amplified in Insurers' opposition and reply briefs. It came as no surprise to Petitioners. Petitioners made no attempt to deal with this position, other than brief conclusory statements in their opposition and closing briefs, until oral argument when they presented their discredited "phantom comma" theory.

Petitioners' contention that the circuit court's decision is contrary to the law of every other circuit is flatly wrong. The circuit court in this case affirmed summary judgment based on the conclusion that Petitioners had ample notice and opportunity to submit evidence in support of an essential element of Petitioners' case. Other circuits apply the same rule. *Howell Petroleum Corp. v. Leben Oil Corp.*, 976 F.2d 614, 620 (10th Cir. 1992) (affirming summary judgment against moving party, where the moving party's own motion raised the issue upon which the court based its decision); *National Expositions, Inc. v. Crowley Maritime Corp.*, 824 F.2d 131, 133-134 (1st Cir. 1987) (affirming summary judgment against moving party, where the moving party had adequate opportunity to show a genuine issue of material fact, including the opportunity to do so on a motion for reconsideration in the district court); *Marshall v. Local Union No. 6*, 960 F.2d 1360, 1368 (8th Cir. 1992) (affirming summary judgment against moving party, where moving party was on notice that the issue upon which the district court based its decision was before the court). Indeed, other circuit courts have affirmed summary judgment where the losing party had far less notice and opportunity to respond than Petitioners had in this case. *E.G. Portsmouth Square, Inc. v. Shareholders Protective Committee*, 770 F.2d 866, 869-70 (9th Cir. 1985) (affirming summary judgment entered sua sponte by district court after pretrial conference); *Lindsey v. Bureau of Prisons*, 736 F.2d 1462, 1463

(11th Cir. 1984) (affirming summary judgment against moving party, where moving party did not have notice that magistrate would order summary judgment against moving party but such party had opportunity to respond by filing objections to magistrate ruling).

In short, Petitioners' argument that the lower courts' rulings in this matter are in contravention of Fed. R. Civ. P. 56 is without merit and does not present an issue worthy of this Court's consideration.

II. The Circuit Court's Ruling Is Consistent With Ohio Law and No *Erie* Question Is Presented.

Petitioners' attempt to raise a question based upon *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), is completely without merit. Petitioners' *Erie* argument is based upon a foundation of false premises.

First, Petitioners incorrectly claim that, in reaching its decision on the number of occurrences, the circuit court did not rely on a single Ohio decision or attempt to apply the principles of Ohio law. However, the circuit court's ruling was expressly based upon Ohio law and its finding that the occurrence definition in the subscriber policy was clear and unambiguous:

> In Ohio, as in most states, a court reviewing an insurance policy must give all the words and phrases in the contract their natural and commonly accepted meaning. *Tomlinson v. Skolnik*, 540 N.E. 2d 716, 718 (Ohio 1989) (quoting *Golmolka v. State Auto. Mut. Ins. Co.*, 436 N.E. 2d 1347, 1348 (Ohio 1982). The doctrine of construing the language against the insurance company does not come into play unless a clause is ambiguous. *King v. Nationwide Insurance Co.*, 519 N.E. 2d 1380, 1384 (Ohio 1988). As the District

> Court correctly concluded, the clause at issue in this case is not ambiguous.

Petitioners' App. 7-8.

Thus, having found the policy language unambiguous, the circuit court, consistent with Ohio law, had only to apply the policy language to what was an essentially undisputed factual record. As the court noted, "Ohio law requires that we look first to the language of the contract in trying to resolve the parties' dispute. We can go behind the face of the policy only if we determine that the controverted language is unclear or ambiguous." Petitioners' App. 10.

The circuit court, to assist it in construing the language, then looked to the cases on the number of occurrences issue cited by the parties. This leads to the second false premise of Petitioners' *Erie* analysis. Petitioners claim that the circuit court ignored relevant Ohio precedent on the number of occurrences in reaching its decision. However, as is clear from the circuit court opinion, it considered the Ohio and other precedent[8] cited by

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[8] One of the cases relied upon by Petitioners below was recently reversed by the Second Circuit Court of Appeals. *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, ___ F.3d ___, Slip op. at 76 (2d Cir., Dec. 13, 1995). The Second Circuit in reaching its decision also distinguished or criticized the following cases relied on by Petitioners: *Champion International Corp. v. Continental Casualty Co.*, 546 F.2d 502, 506 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977); *Uniroyal, Inc. v. Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988); *Owens Illinois, Inc. v. Aetna Casualty & Surety*, 597 F. Supp. 1515 (D.D.C. 1984); *Michigan Chemical Corp. v. American Home Assurance Co.*, 728 F.2d 374 (6th Cir. 1984).

Petitioners and dismissed it as irrelevant, as it dealt with materially different language.[9]

> Many of the cases cited by Babcock would superficially appear to support their position that only one occurrence exists. A closer look, however, reveals that the resolution of these cases turned on a definition of occurrence different from the one in the policy at issue.

Petitioners' App. 10.

Finding Ohio law to be silent with regard to the relevant policy language, the circuit court properly looked to decisions from other jurisdictions interpreting substantially similar language for guidance. *Bailey v. V.&O. Press Co., Inc.*, 770 F.2d 601, 604 (6th Cir. 1985); *see generally*, 19 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4507 n. 53. Finding the available precedent to be persuasive, the circuit court properly affirmed the district court's summary judgment in favor of Insurers.

Indeed, the case upon which Petitioners base their *Erie* argument supports the circuit court's decision. *Commissioner of Internal Revenue Service v. Bosch*, 387 U.S. 463 (1967). As this Court noted in *Bosch*, where a state's highest Court has not ruled on a matter, a federal court sitting in diversity must give "proper regard to *relevant* rulings of other Courts of the State". *Bosch*, 387 U.S. at 465 (Emphasis added). As both the district court and circuit court found the Ohio and other precedent cited by Petitioners to be irrelevant, the courts properly afforded no weight to that precedent. Petitioners' App. 10, 32-34.

There is simply no basis for Petitioners' argument that *Erie* was improperly applied.

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[9] The district court also dismissed the cases cited by Petitioners as irrelevant. Petitioners' App. 32-34.

CONCLUSION

For the foregoing reasons the Respondents respectfully request that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE BABCOCK & WILCOX COMPANY,	)	
Plaintiff,	)	Civil Action No.
vs.	)	5:91CV0987
ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY, et al.,	)	
Defendant.	)	

TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY JUDGMENT
HAD BEFORE THE HONORABLE SAM H. BELL, JUDGE
OF SAID COURT, ON FRIDAY, MAY, 14, 1993
AT 9:00 O'CLOCK A.M.

APPEARANCES:

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[p. 3] THE COURT: We have gone over the briefs in this case, as well as the motions themselves in answer to at least one request, I did feel that it would be of value to hear your arguments. I believe we set an hour and a half, did we, to a side with the prayer that you would not use it all.

So may we start with B&W in relation to the cross issue and then we'll have to come over to you folks.

It that all right, Matt?

MR. HATCHADORIAN: Yes, sir.

If it please the court, your Honor, Mr. Salmon and I had discussions and we wanted to keep this hearing confidential in terms of any outside parties that might wander in. Anyone that's in the courtroom now is involved in the case, we have no objections, but while I'm talking, while he's talking, if anyone else walks in we ask that they not be permitted to be in here because of the nature of the case.

THE COURT: Mike, why don't you just lock the door and that will make it easier.

Now you are sequestered.

MR. HATCHADORIAN: Thank you, your Honor.

And on another issue, before I start, I would like to ask if I might to be able to reserve some time.

THE COURT: Sure, of course.

[p. 4] MR. HATCHADORIAN: I would like to reserve a half hour of my time after the defendants finish their presentations.

THE COURT: Certainly.

MR. HATCHADORIAN: Your Honor, the issue this morning, if it please the court, is under Ohio law whether asbestos-related claims covered by the subscriber policy constitute one occurrence or whether each personal injury claim is a separate occurrence. That's why we are here this morning. The plaintiffs submit the one occurrence position is a reasonable interpretation supported by Ohio law.

I would like to begin my presentation by reviewing the Babcock and Wilcox's program for comprehensive general liability in the 1979, 1980 year.

If it please the court, I would just like to put a poster up on the easel here.

THE COURT: Sure.

MR. HATCHADORIAN: Your Honor, what we have tried to portray –

THE COURT: Matt, I'm sorry, could you turn it just a little so these folks could see it?

MR. HATCHADORIAN: Thank you, your Honor.

THE COURT: Better gentleman? Thank you. I could see it okay.

[p. 5] MR. HATCHADORIAN: You can see it?

THE COURT: Yes, sir.

MR. HATCHADORIAN: Can you see it all right?

The program for Babcock and Wilcox for the insurance in the 1978 year started with a two million primary policy with Travelers; half a million dollar policy with Creole; the subscriber process, first layer access between 17 and a half and 20 million and an additional 130 million over the subscriber policies in additional expense coverage layers.

Each layer in the policy is triggered when a single occurrence exceeds two and half million dollars. And in effect, your Honor, the Traveler's and Creole policies amount to a two and a half million dollar deductible under this scheme.

Now turning to the subscriber policy in particular, the subscriber policy in the schedule of underlying insurance required a half million dollars underlying and then at two million, before the subscriber policy was triggered, Babcock and Wilcox was only required to have a half a million dollars in that initial primary policy, they decided to go out and get a two million policy with Travelers. So they got more than they were required to get.

[p. 6] I would like to point out also that the subscriber policy is excess to many other primary policies in addition to the primary policy with Travelers. If you

looked in the schedule of underlying insurance, this subscriber policy is an excess policy too, I believe, approximately 30 primary policies. My point being, that it's a very broad, wide-ranging policy.

It's undisputed in this case that no single claim in '79 and '80 exceeded two and a half million dollars. And it's also undisputed that if all claims arise out of one occurrence, they far exceed two and a half million dollars. So the issue as it's framed for the court, if each claim is a separate occurrence, Babcock and Wilcox has no coverage under the subscriber policy. And if all the claims constitute one occurrence, then Babcock and Wilcox does have coverage under the subscriber policy.

Next I would like to look at specific parts of the policy itself. And we have blown up a few of the pages to assist the court in my presentation.

First of all, your Honor, we would like to direct your attention to the declaration sheet. This indicates that the insured is J. Ray McDermott, et al., which includes Babcock and Wilcox as a subsidiary. It indicates that losses of the assured, which sustain the loss between 1979 and 1980 is what is covered by this [pp. 7] policy. It also indicates that it's in an excess umbrella liability insurance policy.

Your Honor, we submit that this policy of insurance was intended to cover losses occurring during the policy period. And you can look right on the cover sheet and it indicates assured which sustains the loss at and from April 1st, 1979 to April 1st, 1980.

Next the coverage clause. We believe there are three elements here that were important in the coverage clause. First of all, the underwriters hereby agree to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of their liability imposed upon the Assured by Federal, State and Municipal or other qualified authority or in respect of such liabilities assumed by the Assured under contract or agreement.

In this particular case, the facts are that the liability was established in almost all cases by settlement agreements, and that would fall within the purview of the language here in respect of such liabilities assumed by the Assured under contract or agreement.

Then it indicates for property damage and personal injuries as defined herein resulting from an occurrence as defined herein.

[p. 8] So we need to go to the definition sections on the definition, first, of personal injury, and then we'll proceed to the definition of occurrence.

The definition of personal injury, I have highlighted it there just to make it stand out. The term personal injury, whenever used herein, means bodily injury and disease, which we believe are the two parts that apply to this particular case.

Next, your Honor, we go to the definition of occurrence in the policy. This is standard insurance industry language that originated in London in the 1940's. Occurrence is a trade term that has special meaning in the insurance industry and it is derived from custom and usage in the industry. Historically in the 20th century

there have been three types of limits in insurance policies. There has been accident limits, there has been occurrence limits, and there has been claims made limits.

The subscriber policy is not an accident policy. The subscriber policy is not a claims made policy. The subscriber policy is an occurrence policy to cover losses occurring during the policy period.

Occurrence limits are intended to provide broad coverage, and occurrence limits have two basic components. One is a combining features component, which is intended to group similar claims that arise from one cause, and the [p. 9] other is a trigger component which relates to losses occurring during the policy period.

In this particular case, applying the words that are in the definition, it is the position of Babcock and Wilcox that the event in this case was the continuing decision of Babcock and Wilcox to use or permit the use of asbestos in boilers and to put those boilers into the stream of commerce.

The policy does not say sudden and accident event, and it does not say an event occurring within 72 hours, it just says one event.

As far as the term happenings or series of happenings, in this case the happenings or series of happenings are the asbestos-related bodily injuries that occurred between '79 and '80. And the complaints against Babcock and Wilcox alleged injury during '79 and '80 and, it's stipulated in the stipulations that were entered into on page 9, item 6, that in fact the injuries referred to occurring between 1979 and 1980.

One of the issues that the court faces in this particular case is whether the words "taking place during the term of this contract" relate to happening or series of happenings or relate to events. There is only one comma here, there appears to be a comma missing. This definition was written by the insurance industry and they [p. 10] could have drafted a clearer definition. But we believe that the definition has to be viewed not in a vacuum, it has to be viewed in the context of the entire policy.

It's the position of Babcock and Wilcox that the event does not have to occur during the policy year, only the happening does. And as we indicated, the event is the continuing decision to use or permit the use of asbestos in the boilers; the happenings or the series of happenings are the injuries.

But even if you do find that the event has to occur in the policy year, in this case the event is a continuing decision and it also occurred during the policy year.

So we believe whether you find the event has to take place during the term of the contract or whether the happening has to take place during the term of the contract, in this particular case both the event and the happening or series of happenings did. Again, the happenings or series of happenings are the injuries that occurred in 1980; and the event is the decision of Babcock and Wilcox to use or permit the use of asbestos in the boilers and to put those boilers into the stream of commerce.

We believe the evidence shows that the asbestos claims fall within the purview of the coverage clause and

[p. 11] the related definitions. We think it is also important to point out to the court, there are no asbestos exclusions or relevant exclusions in this policy. And we also think that we should point out to the court that in the limit of liability section, one looks at that section of the policy to determine when the subscribers are liable to pay and how much. And our conclusion is that the subscribers must pay when each occurrence exceeds two and a half million dollars up to 20 million dollars.

You do not look to the limit of liability section to determine the number of occurrences. It's our position that that's already determined from the coverage clause and the related definitions that asbestos claims should be grouped, combined as one occurrence.

Now, the United States Supreme Court in the case of Erie Railroad versus Tomkins stated that in federal diversity matters the law to be applied is the law of the state. And the Sixth Circuit in a 1990 case, Akron Auto Rental versus Akron Auto Rental, stated the following, said in diversity cases a federal court must apply state law in accordance with the then controlling decision of the highest state court.

If the state's highest court has not addressed the issue, the federal court must ascertain from all available data, including decisional law of the state's [p. 12] lower courts, restatements of the Law Review commentaries and decisions from other jurisdictions of what the state's highest court would decide if faced with the issue.

In this particular case, your Honor, the court has already decided that Ohio law will be applied to this case as to the interpretation of the policy as it relates to

Babcock and Wilcox. There is no Ohio Supreme Court case on point, but we have three Ohio cases that support your interpretation.

The first is the Morton Thiokol case, which is a 1988 case from Hamilton County. That case says that all asbestos claims arise from one occurrence, and the occurrence was the corporate decision to manufacture and distribute asbestos and break up components, and that was a single occurrence.

So just as we are asserting our position this morning that the event in this case was the corporate decision of Babcock and Wilcox to use or permit the use of asbestos in its boilers, the Morton Thiokol case sets the law in Ohio that a corporate decision to manufacture and distribute asbestos and products was a single occurrence.

The second Ohio case that we believe the court should refer to is Grand River Lime versus Ohio Casualty. That case is a 1972 decision of Franklin County Court of Appeals. It's a case that concerns pollution from a [p. 13] manufacturing facility over the course of several years.

In that case, the court held that all claims arising out of this manufacturing activity constituted one occurrence. And the court said that occurrence need not be a sudden event and that occurrence can encompass a period of time.

Third of all, the case of Owens-Illinois versus Aetna was a 1984 decision of the United States District Court for the District of Columbia, but its noteworthy because it applied Ohio law.

In that case the court held that the manufacture and sale of insulation was a single occurrence and set forth the cause test.

Now I want to emphasize this cause test and the court's language, and I want to use a poster in that regard. This is at page 1525 of the Owens-Illinois, decision.

The court said, "The unifying definitional provisions make it clear that the number of injuries or claims, even if temporally removed from their causes, are irrelevant when determining the number of occurrences.

"Using this analysis, the court asks if there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damages."

And, your Honor, if it please the court, we [p. 14] would submit on behalf of our client, Babcock and Wilcox, that this is the test the court should use in this case. The court should ask if there was one proximate, uninterrupted and continuing cause which resulted in all the injuries and damages.

In this particular case, it's our position that the one proximate, uninterrupted and continuing cause which resulted in the injuries was the decision of Babcock and Wilcox to incorporate asbestos, use it in its products, and place the products into the stream of commerce. This decision includes specification, manufacture, sale, repair and maintenance.

This continuing decision was the proximate cause of injuries to third parties, and those injuries gave rise to the liability of Babcock and Wilcox.

We think it's important also, your Honor, that Ohio law is consistent with the positions taken in the majority of jurisdictions in the United States. The vast majority of courts have concluded that the number of occurrences is determined by referring to the cause of the damage and not to the number of injuries or claims.

Two cases in particular that we would like to refer the court to are Air Products versus Hartford Accident, which is a United States District Court decision from the Eastern District of Pennsylvania. It's cited in [p. 15] the briefs, it's a 1989 decision. At pages 772 and 773, the court cites the various decisions throughout the United States; takes the position that the number of occurrences are determined by referring to the cause of the damage.

Another decision which also talks about decisions throughout the United States on this issue is Stonewall Insurance Company versus National Gypsum. That is a United States District Court decision from the Southern District of New York in 1992. And in particular at page 20 of that decision, the court goes into a detailed discussion of what is an occurrence and how should the court determine the number of occurrences.

Again, the court concluded in that case the number of occurrences is determined by referring to the cause of the damage.

THE COURT: May I ask you at this juncture, since you seemed to be stopped for just a moment, could you analyze it a bit more, if you would be so kind, as to your rationale concerning the interpretation of the word occurrence, please?

MR. HATCHADORIAN: Yes. Our rationale is that there are two factors in these occurrence definitions. One is the triggering concept and one is the combining factor.

[p. 16] The triggering concept is an injury occurring during the policy period. A combining factor is grouping of similar claims when they arise out of one common cause, one continuous, uninterrupted cause.

And in this particular case the question arises, in looking at the occurrence definition, whether the term happening or series of happenings has to occur during the policy term or whether the term event has to occur during the policy term.

THE COURT: Well –

MR. HATCHADORIAN: Is that what you are referring to?

THE COURT: Yes, and I appreciate that. The occurrences are linked to the event then in what way?

MR. HATCHADORIAN: They are linked to the event in that the event is the cause of the happenings or series of happenings.

THE COURT: And the event would be the decision generally?

MR. HATCHADORIAN: A continuing decision, corporate decision, just as in the Morton Thiokol case, of Babcock and Wilcox to use and permit the use of asbestos in the boilers and to put those boilers into the stream of commerce.

THE COURT: Now each of the occurrences, I [p. 17] would assume – let me put that the other way.

If a maritime company sought the design, service and manufacturing service of B&W on a separate contract, B&W was in the situation, was it not, where it drew plans in one of two ways. There could have been, I assume, a standard type of X, Y, Z boiler that was manufactured for the shipping customer, or there could have been a custom made boiler for that same customer, is that correct?

MR. HATCHADORIAN: You are asking me if they made a boiler according to certain specifications for a certain customer? Yes.

THE COURT: We know they did.

MR. HATCHADORIAN: Yes.

THE COURT: At that point, B&W faced the necessity of making what decision? Did they say at that time: Look, we know that since the time we made the last boiler we got some asbestos problems, did the asbestos configuration – that is the decision to use that type of, for want of a better word, wrap – play into the diagrammatic proposal of B&W to the eventual customer where they had to make an individual decision as to that boiler unit on that particular customer?

MR. HATCHADORIAN: We specified asbestos and the customer could decide whether they wanted to use that [p. 18] insulation or not.

THE COURT: So B&W was making note of the fact then, that asbestos in relation to that particular job was an option?

MR. HATCHADORIAN: Yes. And they also incorporated asbestos into other products besides the boilers.

THE COURT: Okay.

MR. HATCHADORIAN: Between '72 and '89 – between 1972 and 1989, Babcock and Wilcox made a decision to phase out the use of asbestos and to try to find a replacement; this didn't stop until 1989.

The issue came up in the case and we provided to the defendants a 1979 product list that itemized several products that contained asbestos, such as gasses, because that issue came up. So what actually happened during that last 17 year period which incorporates the 79-80 year, there was a reduction in the use of asbestos in the products and in its recommendations, but it was a gradual phase-out type of a thing.

THE COURT: I understand.

As I read your briefs and I hear your discussion, however, you are saying – so I understand you correctly – that the event was the original decision to use the asbestos.

[p. 19] MR. HATCHADORIAN: And its permitted use.

THE COURT: And the continuing decision to use the asbestos.

MR. HATCHADORIAN: Yes.

THE COURT: And the fact that each of the boilers which were manufactured in this demanded a

specific engineering for the purpose of which it was intended, you are saying, does not constitute a series of separate decisions but rather follows the earlier and continuing decision.

Do I understand you correctly?

MR. HATCHADORIAN: Yes.

THE COURT: Okay. I'm sorry to interrupt you.

MR. HATCHADORIAN: It's the same thing as in Morton Thiokol.

THE COURT: Well, it's not quite the same thing, because here when that customer from the shipping company comes to you and says I'm going to build this humongous boat – ship I guess would be better – design your boiler system for me, what you are really doing is designing a new product but, you are saying, I guess, under an old conventional choice of material, is that correct?

MR. HATCHADORIAN: Just a straight line.

THE COURT: To that degree it's different from [p. 20] Morton Thiokol, is it not?

MR. HATCHADORIAN: Well, they used asbestos in Morton Thiokol in brake components and they may have tailor made some of the brake components for specific purposes too.

THE COURT: But these installations were separately contracted and separately engineered, were they not?

MR. HATCHADORIAN: The boilers?

THE COURT: Yes, sir.

MR. HATCHADORIAN: Yes.

THE COURT: And to you that does not change the original?

MR. HATCHADORIAN: No. The ongoing, continuing decision was the same.

THE COURT: Okay, thank you.

MR. HATCHADORIAN: We believe that our position, in terms of event and cause, is the majority view and we ask the court to apply the cause test that is up here on the board that was set out and discussed at length in the Owens-Illinois case.

Generally the cases say to determine the number of occurrences, you can use a cause test or an effect test. The cause test, as I indicated, you look to see if there is one proximate, uninterrupted and continuing [p. 21] cause. The effect test means you determine the number of occurrences by looking at the number of injuries or claims. And the courts around the country discuss those two tests.

The defendants in this case allege that they used the cause test, but in fact we feel that they were arguing the effect test, and I'll explain why.

The defendants in this case say the event is exposure to asbestos. We say the event is the continuing decision, as we discussed. And they say that the happening or series of happenings is the injuries, same as we do. But

the problem with their theory and why it doesn't make sense is exposure and injury occur simultaneously, and they are not the same thing.

Whether you use the effect test or what they call the immediate cause test in their brief, it's true that the number of occurrences are exactly the same. And what they are asking the court to do is to use the effects test. They are asking the court to determine the number of occurrences by the number of injuries or claims, and that is not the law in the State of Ohio. And they have not cited one Ohio case on the number of occurrences issue, which I think is noteworthy.

THE COURT: Is it appropriate scientific theory that exposure and injury do follow together?

[p. 22] MR. HATCHADORIAN: That they occur simultaneously?

THE COURT: Yes, sir.

MR. HATCHADORIAN: Is it scientific theory? I don't know if it's scientific theory but I think common sense says they do.

If a young man goes into a classroom and gets exposed to chicken pox and two weeks later he breaks out in pimples all over his body, do you say he was injured when he was exposed to the germs in the classroom or is he injured when all the pimples break out?

THE COURT: Well, the exposure to asbestos, I take it, does not cause injury to all who are exposed to it.

MR. HATCHADORIAN: I think that's accurate.

THE COURT: But conversely the injury would come with exposure. I take it you mean at any time during the exposure.

MR. HATCHADORIAN: When the person is exposed to the asbestos, we say that that's when they are injured.

THE COURT: At some time during the exposure; not originally but at some time during?

MR. HATCHADORIAN: Yes.

THE COURT: Okay.

MR. HATCHADORIAN: One of the cases that the [p. 23] defendants rely on is the Norfolk & Western Railway Company case. And that's a case where a railroad brought an action against an excess insurer seeking to recover under policies for claims arising out of the noise-induced hearing loss. And I would like to make a couple of points as to why the court should not rely on that case as authority for this case.

That case did not involve asbestos-related bodily injury, but more importantly there were multiple causes of the noise-induced hearing loss in the railroad case. In other words, these noise injuries were caused by many different causes. They weren't caused by one proximate, uninterrupted and continuing cause.

In addition, in that case the insured asked the court to adopt the theory that negligence and failing to protect its employees from the hazards of noise exposure was a single occurrence. And we think that's different than our

case where there was a continuing event by Babcock and Wilcox being the corporate decision.

I think it's also important to mention that although the court rejected the railroad's broad theory, it did not adopt the subscribers theory in the case.

Another argument that the defendant's have made is that a cause or event must be short in duration to trigger the subscriber policy. And the Sixth Circuit has [p. 24] spoken on that point and I would just like to refer to a section in what the Sixth circuit said in the Michigan Chemical Case about a cause or event. The argument that a cause or event must be short in duration to trigger the subscriber policy itself at page 380 of the case.

I'm quoting from what the Sixth Circuit decision: "One commentator has suggested that if a single cause and numerous injuries are closely linked in time and space, then there has been one occurrence, but if a cause and its effects are temporally removed, then each injury constitutes an occurrence."

This argument however, was considered and rejected by the Third Circuit in the Appalachian Insurance case. The fact that there were multiple injuries and that they were of different magnitudes, and that injuries extended over a period of time, does not alter our conclusion that there was a single occurrence.

Indeed, the definition of occurrence in the Appalachian policy contemplates that one occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time.

In addition, the fact patterns of the Champion, Pincoffs and Union Carbide cases demonstrate that the number of injuries, even if removed temporarily from their causes, are irrelevant when determining the number of [p. 25] occurrences.

The last point I would like to make, your Honor, is that we believe that the defendant's theory in this case flies in the face of commercial common sense. And we would like to make a few points to the court.

First of all, if the intention of the parties in this case was for each claim to be a separate occurrence, why would McDermott have purchased a 150 million dollars in insurance? It's hard to conceive of a single claim approaching a 150 million policy limit.

Second of all, why would McDermott purchase a two million dollar primary Travelers policy and purchase a subscriber policy on a much narrower sell claim basis.

Thirdly, Babcock and Wilcox didn't manufacture asbestos in 1979, no one could have foreseen, the asbestos litigation explosion occurred in the decade of the '80's. Babcock and Wilcox paid a one million dollars premium for peace of mind insurance to cover unanticipated injuries and losses, and that's what happened here.

A finding of multiple occurrences in this case would effectively deny coverage to Babcock and Wilcox that they bargained for.

The subscribers have four different theories in their briefs as to what the event is, and they have submitted, in the court's words, oceans of evidence, and [p. 26] yet they

say to the court that the term occurrence is not ambiguous. I don't see how they can advocate in their briefs four different theories as to what the words mean and then take the position that it is not ambiguous.

We believe that their argument doesn't make sense when they say the event is exposure and the happening is injury because we believe that those things occur simultaneously and it doesn't make sense for the event to be exposure and for the injury, the happening, to be injury.

In conclusion, our position is we are asking the court to look at the entire insurance policy and apply the plain meaning of the language as to what occurrence means, and we ask you to rule on that basis that third party asbestos claims constitute one occurrence. If you don't agree with our position, then we believe that summary judgment is not appropriate and the case should be submitted to a jury and they can listen to the experts and listen to the lay witnesses and decide.

The extrinsic evidence in this case is not one-sided, there have been four experts who have been deposed, and as the court might anticipate, they have different opinions.

But we believe that if you will apply the plain meaning of the policy under the tests that I have [p. 27] emphasized here using Ohio law, that in this case there is one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damages.

Thank you.

THE COURT: One question.

MR. HATCHADORIAN: Yes, sir.

THE COURT: In relation, again, to the question of the event, your view is that the event, if that be the decision to utilize the asbestos, need not occur during the contract period of the insurance.

MR. HATCHADORIAN: That's our interpretation. We believe the way the clause is written, happening or happenings has to occur, but it's irrelevant for this particular case because both the event, as we have described it, and the happening both occurred during the policy term. And that is so because the happenings are the injuries that occurred in '79 and '80 and the corporate decision was continuing through 1979 an 1980.

So in fact, the event did occur during the policy period in this case and the happening did too.

THE COURT: Well, your adversaries have made a point and I guess it's somewhat subliminal to the one I asked you, surely sometime prior to the application for insurance B&W had made a decision to use asbestos in some form; or an I incorrect on that?

[p. 28] MR. HATCHADORIAN: Prior to the application, to 79-80?

THE COURT: Yes.

MR. HATCHADORIAN: Yes, they had made a decision before that time.

THE COURT: If the event that you suggest is the decision, does that not mean that the event took place prior to the application for the insurance?

MR. HATCHADORIAN: No, it doesn't mean that because it was a continuing decision. It was a corporate decision that continued over a long period of time. As the cases say, occurrences can occur over a long period of time, it's not just a decision in isolation. They could have decided anywhere along the way there, say we are not going to use asbestos anymore, but they didn't.

THE COURT: That goes back to my earlier question then, your answer to my question would have been yes, that with each modification and each contract they made that decision again, they reinstituted that decision.

MR. HATCHADORIAN: In essence they didn't revoke the decision, yes, but I believe it is one continuous and uninterrupted decision.

THE COURT: What if then they offered an alternative to the shipbuilder, if you will, to use it or not use it? What does that do to your theory?

[p. 29] MR. HATCHADORIAN: In other words, if they wanted to use a different type of insulation?

THE COURT: Yes.

MR. HATCHADORIAN: It doesn't change the decision of Babcock and Wilcox.

THE COURT: Whose decision is it, B&W's or the customer?

MR. HATCHADORIAN: B&W made the decision to specify asbestos. If they asked us, we say that's what we suggest you use. They specified the asbestos as the insulation.

THE COURT: So the contract to build that is, it's not: Well, do whatever you want to do; it is, this is the way we are going to do it unless you tell us to do it otherwise, is that the twist?

MR. HATCHADORIAN: We are recommending that you use it.

THE COURT: Okay.

MR. HATCHADORIAN: And we are going to permit you to use it. If you want to use something else then that's your decision, but our decision is we should use asbestos.

THE COURT: Thank you very much.

MR. SALMON: Your Honor, I should perhaps note there are two other parties who also assert the one [p. 30] occurrence position, Creole and McDermott. I don't know if they wish to make a presentation this morning, but it might make sense if they want to argue to put all the one occurrence people together so we were not ping ponging back and forth.

THE COURT: I had looked at Mr. Hatchidorian's argument as being synoptic, but perhaps I'm wrong.

MR. MOSELEY: Your honor, I just reserve my right to speak afterwards. I don't think there is any disagreement here. I think after we hear from the other side we may have something to say.

THE COURT: May I interpret that statement as meaning that counsel has stated your view as well as his own?

MR. MOSELEY: Yes, your Honor.

MR. STARLING: Your Honor, Creole is likewise in agreement with B&W's position.

MR. SALMON: Thank you, your Honor.

May it please the court, my name is Robert Salmon, I am counsel for St. Paul Mercury Insurance Company, one of the defendant subscribers to this case and one of the moving subscribers to your Honor this morning. This morning I am not speaking on behalf of St. Paul, because it is the other moving subscribers who have jointly filed a series of three briefs on a number of [p. 31] occurrences. The moving subscribers aside from St. Paul are Mr. Kajander's clients, Arkwright-Boston, American Home and Alliianz Insurance Company, as well as Mr. Cleary's client, the London Market Insurance.

My plan, your Honor, is to take about 45 minutes, more or less, to explain why we believe summary judgment in favor of the moving subscribers is appropriate. And I also will do my best to answer any questions that the court might have.

THE COURT: Will you do me one favor?

MR. SALMON: Certainly, your Honor.

THE COURT: I don't mean to interrupt you in any manner, but we are doing some sawing upstairs, if that interrupts your train of thought, tell me and I stop it.

MR. SALMON: Thank you, your Honor. After my presentation, to the extent we do have time remaining – and I certainly don't intend to take all of it – counsel for

some of the other subscribers may have a few words they may want to add.

My goal this morning, your Honor, is helping the court in distilling the record that is before you, and identifying what we believe to be the most appropriate legal authority. If I could take just a minute to explain the record that has been submitted by the moving subscribers, I indicated we did submit three briefs on the [p. 32] number of occurrences.

We have also put into the record, and have available to the court, five appendices. The first appendix is a compilation of the drafting history of the subscriber policy which indicates that a series of at least 10, perhaps, preceded the policy. And that's marked DA in our briefs.

The general appendix is in two volumes. That contains depositions that we have submitted as well as most pertinent deposition exhibits. We submitted a reply appendix and also a supplemental appendages.

I think it is important to note that the case has been pending before you for nearly two years. And in that two year period a total of about 42 depositions, by my count, have been taken. A number of documents have been exchanged. Discovery in the case has closed and the parties have had more than sufficient time to conduct the discovery that they need and to complete discovery.

In summary, the case before you today is ripe for summary judgment. Summary judgment is particularly appropriate as it concerns the interpretation of insurance contract language. Insurance contract language interpretation is normally a question of law for the court and

we believe it can be interpreted before you as a matter of law on the cross motions for summary judgment.

[p. 33] As all of the parties in the plaintiffs' side and McDermott and Creole and a number of the subscribers have moved for summary judgment, there appears to be unanimous consent there are no material fact disputes. The parties disagreements in this case, your Honor, boil down to the legal standard by which the policies should be interpreted, the manner in which it should be interpreted, in addition to certain collateral legal issues that we probably won't get into today in any great detail, other than to note that there are questions regarding the applicability, for instance, of the Doctrine of Contra Proferentem. It's the doctrine of construing ambiguities against a drafter.

We were essentially intending to rely on the briefs on that, it's a legal question, your Honor. It doesn't get into any fact disputes.

The parties also disagree, to a certain extent, as far as what the general rules are for interpreting insurance contracts, which again are legal questions that your Honor can decide under the law of the State of Ohio.

So as far as the material facts of this case are concerned, much of the key evidence is documentary evidence because due to the passage of time between 1979 and now, there have been a number of fading memories in the case.

[p. 34] The issues before your Honor are limited to coverage for the 1979-80 Babcock and Wilcox asbestos liability situation. There is a settlement agreement in

force between B&W and its carriers for all of the other years before you on a fact stipulation that has been submitted to the court. The language in those other years is different, and based upon those differences an agreement was struck which, for the other years, B&W's asbestos liabilities have been funded to the tune of over 300 million dollars. The settlement agreements, however, specifically excepts the 1979-80 policy year which is before you.

It's crystal clear, based upon the evidence before you, that McDermott is and was a sophisticated assured, as was Babcock and Wilcox. The record bears out the fact that in 1978 – that is one year before the subscriber policy – McDermott engaged in a stock acquisition of B&W.

McDermott had previously placed it's excess liabilities coverage with an outfit up in Canada by the name of Minet and had their own insurance department in New York.

On the other hand, McDermott risk managers down in New Orleans handled the McDermott excess liability program.

[p. 35] I do have that chart I would like to show you at this time pointing out some of the differences between the coverages that preceded and post-dated the subscriber policy.

THE COURT: Bob, do you suppose you could put the easel over there and with the exception of your cohorts behind you?

MR. SALMON: Sorry guys.

THE COURT: Gentleman, if you want to move back here you can. I can't offer you anything else.

MR. SALMON: Your Honor, as I indicated, the policies before the subscriber years 79-80 were placed through Minet up in Canada and contain a radically different definition of occurrence from that which appears in the subscriber policy that Mr. Hatchadorian has been talking about.

The situation for 1979-80 was such that McDermott made the decision to shut down B&Ws insurance department and assume responsibility for taking over the B&W insurance program for 79-80, the year at issue in our case. And they decided – this is Mr. Falencki who's the Risk Manager – decided to try to go out in the open market, get one excess liability policy program together that would cover both B&W on the one hand and McDermott on the other.

[p. 36] This situation afforded McDermott's risk manager the unique opportunity to go out into the insurance market and essentially make Minet an offer of Adams and Porter. So what they do is they give certain authority to Minet to go out secure the best possible terms while they give the former and they give Adams and Porter, the broker with McDermott, authority to go out and get a competing proposal. And what comes back are two different proposals.

The Minet proposal for 1979-80, your Honor, used the same occurrence language that had appeared in the prior seven years of coverage with Babcock and Wilcox. This

determination of occurrence is radically different from that which was used in the 79-80 subscriber policy.

The first area of differences concerns what Mr. Hatchadorian called the combining feature of definition of occurrence. We called it the one occurrence condition in our briefs, and that is the proposition that was set forth in the Minet language and was also used after the subscriber policy.

The proposal in all such exposure to substantially the same general conditions basically can be aggregated as one occurrence. That language does not appear in the [sic] either the Adams and Porter subscriber policy definition of occurrence in the limits of [p. 37] liabilities or in any other section of the Adams and Porter policy that is at issue in this case.

B&W has also indicated that the other general principle that one looks to in an occurrence based policy, aside from the combining feature or one occurrence condition which does not appear in the Adams and Porter policy, is triggering based upon when the injury occurs.

And we see in the Minet policies that were used before, and in the Adams and Porter policy that was used in the year immediately after the subscriber policy, that's exactly what is says. It says it provides coverages for personal injury, property damage or advertising liability that occurs during the policy period. They are not looking under the Minet language to win the accidents or the happening or the event. That is the cause takes place – rather the general principle, as B&Ws has indicated, is that you look to when the damage takes place.

Now, what happened next? Mr. Falencki is given the Minet proposal for 79-80 at a cost of 1.75 million dollars. He's giving the Adams and Porter proposal at a cost of a million dollars. The two layers of coverage are essentially in equal amounts: Subscriber layer would be 17 and a half million; Minet proposal was 20 million. The excess, there are excess, slightly different amount of [p. 38] insurance.

Mr. Falencki, the Risk Manager of McDermott, then looks at the two proposals and essentially decides, based upon cost, according to one of his memos, to go with the less expensive proposal. And he states – I'm quoting from Exhibit 54, which is a memo he wrote in March of '79, it's in the record.

He states that: "The price disparity between the Minet and Adams and Porter proposals is of such a nature that financially the company would be best served by a satisfactory completion by Adams and Porter.

Choosing the Adams and Porter proposal not only for the subscriber layer but all the way up to the 150 million dollars that was shown on Mr. Hatchadorian's blowup resulted in cost savings of over one million dollars as opposed to what could have been achieved.

Now, is the cost difference based solely upon the definition of occurrence? There is simply no evidence in the record of that. We are not claiming that's the only difference in the policies, it may or may not be a factor.

I think the significance of the comparison shows: Number 1, McDermott had available to it for the 79-80 policy year a number of viable options. They were a sophisticated insured who was able to go out to two [p.

39] sophisticated brokers and get two different proposals. This is not a situation where someone put a gun to McDermott's head and said, here is the only type of coverage you can get, standard form language, no opportunity for negotiations, take it or leave it. That's simply not the case and that's not what happened in 1979-80.

Another salient point I believe can be gleaned from the chart. What happened after the subscriber policy? Well, they went back to the old Minet policy, the language that had the combining feature that allowed them to aggregate claims. It also had the – not the causal event that takes place in the policy period as in the subscriber definition of occurrence, but rather follows the general principle and occurrence policies that triggers coverage based upon when the injury took place.

Another unique factor of the 79-80 insurance program is the buffer layer, that was made an intricate part of the subscriber policy.

Now it's clear that the law of the State of Ohio requires that the court, to view an insurance contract as a whole, to read all parts of the policy, and to view all parts of the policy and reconcile them, if at all possible. It's also important – and it's also the law of the State of Ohio – that significant differences [p. 40] in language be given their intended purpose.

Before I talk about the buffer layer and what the parties intended by way of the risk allocation scheme of '79, as to whether or not products liability claims would fall within the buffer layer or subscriber layer, I should note out a significant variation in policy language.

Again, this is the definition of occurrence that appears in the subscriber policy, does not have the unifying definitional provision as the Owens-Illionis [sic], as the court calls it or the combining feature, as B&W calls it. However, in the applicable part of the policy, that having to do with coverage for pollution claims, which is not at issue here, the policy specifically allowed for combining these sorts of claims to treat a series of claims arising from the same accident or occurrence as one occurrence. That part of the policy is a different part of the policy not at issue.

What sort of conclusions can we draw from this? If the parties had intended to allow the aggregation of claims of the sort that are before your Honor, they could have done that by inserting the same verbiage in the definition of occurrence, which was not done.

The buffer layer is written on a per occurrence basis, and it's set forth in the limits of liability [p. 41] section. Our chart here – we do have an eight and a half by eleven size of this and we'll provide your Honor with them.

We believe these are the significant terms of the subscriber policy. We believe that it's not appropriate and it's not the law of the State of Ohio for anyone to put their blinders on and look only to a coverage part and definitions.

It's important that the court view all of the policy terms as a whole and to reconcile them, if at all possible.

The risk allocation scheme set forth in the subscriber policy which manifests the parties' intent is set forth in the Limit of Liability section.

Now in a normal policy – and this is certainly not a normal policy, it is not a standard form policy by any stretch of the imagination – in a normal policy the Limits of Liability section simply says that the amount of dollars of accident and indemnity that an insurance company might end up ultimately having to pay out.

However, in the subscriber policy the Limit of Liability section functions in a much different fashion. The Limits of Liability section of this policy, your Honor, defines the parties mutual obligations.

On the one hand, it defines the obligation of [p. 42] McDermott, and it is obligated under the policy to maintain a buffer layer in the amount of two million dollars per occurrence. And it says that the buffer layer shall not be subject to an aggregate provision, and is deemed to be always in force without diminution. Further, it's deemed to be paramount. And finally while the primary coverage – that's the Travelers coverage – may be exhausted and subject to an aggregate limit of liability.

Which is exactly what happened here. Travelers had a two million dollar aggregate and they paid out their two million dollars, so they are gone, we are now into the two million dollar buffer layer.

The subscriber policy specifically warrants that the buffer layer required by paragraph 2(b) – that's the two million dollars per occurrence – shall not be subject to aggregate limits.

Now what does this mean? We believe that the buffer layer language, which is written on a per occurrence basis, must be interpreted consistently with the definition

of occurrence that appears in the policy and consistently with the parties' intentions.

The record in this case before your Honor is not in dispute as to what the parties intended the buffer layer to mean. The buffer layers was intended to be a [p. 43] layer between the primary coverage which could, and in our case now is exhausted, and the subscriber layer. The intent was that there always be in force this two million dollar per occurrence buffer layer on a non-aggregate basis. It's always in force, not subject to diminution, and there is a warrant it is not subject to aggregate limits.

A week or two ago in completing discovery, McDermott and B&W had an opportunity to take the deposition of an underwriter from INA by the name of Doug Chalout. He was one of the underwriters who was involved in only a small portion of the subscriber policy. Actually it was the last two and one half percent after Adams and Porter had gone out into the market and gotten the 97 and a half percent. So he finds himself very close to the inception of the policy, April 1978 – '79, short two and a half percent.

Mr. Falencki, the Risk Manager of McDermott, has already accepted the Adams and Porter proposal due to the cost disparity. What happens, the fellow at Adams and Porter who's involved in doing this is Gaston Broyles, he is now deceased. He was deceased before this case started and we simply never had an opportunity to talk to him.

Mr. Chalout indicates that he received a call from the fellow at Adams and Porter, Gaston Broyles, [p. 44] requesting that INA get on to the last two and a half

percent of the policy. And the questions are posed in these sorts of answers are given, talking about INAs internal decisions and what was represented to them about what sort of risk would the subscribers be subject to.

And I'm quoting here pages 39 through 41 – and we'll file the complete transcript with your Honor, it was just received yesterday.

"Question: At that point, they – " that is Adams and Porter, "indicated two and half percent was required to fill in. What did you – " that is INA – "do, if anything?"

"Answer – " and this is Mr. Chalout; the INA underwriter: "We – " that's the people at INA – "had a meeting internally among myself, the president of INA International, my assistant and my immediate superior."

And then the question is asked to identify the people. We don't need to go into that. And there is this meeting.

"Question: What decision was made at that meeting?

"Answer: We – " that's INA – "decided or discussed the decision completely recognizing that we were dealing here with their largest single customer and outlining a single producer. We looked at the amount of [p. 45] money that we would loose by the parties paying in the one and a half percent. We had been told by Gaston Broyles that there was a buffer layer involved here that would protect us from any run of claims, and that we only needed to be concerned with a major catastrophe. Based on that representation, the limit involved and the

relationships with the procedure and the insured, we agreed to do the final two and a half percent."

Now we were always able to secure testimony from John Marshall, who was the negotiator at Adams and Porter, the broker, he was negotiating the policy language and we specifically had the opportunity to ask him as to, you know, what was the intent of this buffer layer. And we asked these questions and he gave these answers.

And I'm quoting from page 45 of Mr. Marshall's deposition, which is at tab N of the General Appendix, your Honor.

"Question: Do you recall anything more specific than you have just related as far as the dollar amounts of coverage, for instance?"

"Answer: I believe that he required – " he being Blackman, the fellow at MMO who was doing the negotiating for the subscribers – "I believe that he required two million each occurrence, underlying for products liabilities without any aggregate drop down. A [p. 46] normal umbrella with drop down over depleted aggregate limits. But he required – I don't remember the specific limit, but I believe it was two million each occurrence.

"Question: And was that for B&W and McDermott? Or one of the other or both?

"Answer: I think it was for both. But specifically, it was because of B&W.

"Question: Did you have an understanding as to the nature of his – " that is Mr. Blackman's, the underwriter for MMO – "concern in that regard?

"Answer: Yes.

"Question: What was that?

"Answer: Well, you remember Three Mile Island?

"Question: Right.

"Answer: That's really all I have to say. No he – essentially Mutual Marine Office was a marine underwriter. And he felt – " he, that is, Blackman – "he felt that he should not become primary insurance on products liability areas of a non-marine nature, which he considered B&W to be."

We took a break then and just to complete the exchange, I followed up by asking him:

"Before the break, Mr. Marshal, you made references to some comments and concerns of Mr. Blackman that Adams and Porter – that the Adams and Porter layer [p. 47] not drop down for the products claims. Do you recall that testimony?

"Answer: that's correct.

"Question: Was that the reason or idea behind the two million dollar buffer layer that was used in the 79-80 policy year?

"Answer: That's correct."

The intent of the parties was that this buffer layer in the amount of Two million dollars, according to the fellow who was doing the negotiating for McDermott, the intent was to protect subscribers from precisely the sorts of claims that they were trying to aggregate here. They were trying, your Honor, to aggregate over 120 thousand

asbestos bodily injury claims as a single monolithic, ongoing occurrence so as to exhaust the non-aggregate buffer layer which is partially incorporated by Creole, their captive, so that they could get into the subscriber layer, and when exhausted gets into the 120, 130 million dollars excess of us. That's precisely the reason why the buffer layer was put into this policy.

Just to follow up on the other bit of evidence before your Honor as to the buffer layer. This is the testimony of Mr. Charles Mitchell, who was an underwriting assistant of Mr. Blackman at MMO. And I'm quoting from Mr. Mitchell's testimony at 134. It's in tab R of the [p. 48] General Appendix. The question is posed by counsel for B&W.

"Question: How did the buffer layer come into existence, the concept of the buffer layer?

"Answer: Well, if I remember, Mr. Blackman wanted to do away with the – I'll call them nickel and dime claims, the small claims, the small claims under 5 and $10,000. So that's why he put in the two million any one occurrence, because he wanted to make sure he was not – with McDermott and the B&W, with multifaceted corporation that it is, and with the number of employees and the exposures to, I would call hazardous situation, he wanted to make this policy a true catastrophic policy. He did not want to get involved in the day-to-day claims that he would have."

Again, this simply reinforces that the intent of the parties in providing for this two million dollar per occurrence buffer layer was to protect the subscribers from, in

Mr. Chalout's terms as they were related to him by Gaston Broyles, protects us from a run of claims in the amounts of 5 or $10,000 each, more or less, that may arise from the products liability exposure of Babcock and Wilcox.

And that's exactly the sort of situation we are facing in this case. We have got a run of 120 thousand or [p. 49] more claims that were being settled for well under the sum of 12 million dollars, they were being actually settled for several thousand dollars apiece. They trigger 30 years or more and are essentially having a couple hundred bucks paid under a number of policies. That's specifically the sort of risk that the parties contemplated would not expose the subscribers to this risk.

Now, counsel for B&W then asks the question, well, if that was the case, why did Mr. Falencki, the Risk Manager of McDermott, go out into the market and get 150 million dollars worth of coverage?

I'll tell you why, and this is made plain by the record as well. Both McDermott, an offshore contractor, and B&W had what we call big bang liability. That is the situation where a single cataclysmic event could well cause more than a 150 million dollars worth of damage, and that's exactly what Mr. Marshall said when he said, you know, why they had the buffer layer.

Three Mile Island. Now Three Mile Island nuclear situation wouldn't be covered under our policy because there is a nuclear exclusion; but, for instance, if a single B&W boiler, if there had been a boiler in the basement of the World Trade Center rather than a bomb and it would have caused 700 million dollars damage, there is [p. 50]

certainly that opportunity for big bang liability; same thing with McDermott. Maintain substantial offshore oil rigs and the collapse of a single McDermott rig could take the lives of a number of individuals and cause a significant amount of property damage to the subscriber policy. And that's why they got the 150 million dollars worth of coverage in the lexicon of the subscriber policy that if you work with the hypothetical of the rig going down, the event under the subscriber policy's definition of occurrence would be – and we agree on this – the event is the cause of the injuries, the event under that scenario would be the rig going down.

The happening or series of happenings – and this is another point that this moving subscribers and B&W agree on, we agree that the happening or series of happenings refers to the injuries. Under that scenario, the situation where there are a dozen seamen that lose their lives and we have got 50 million dollars worth of property damage to a number of boats, that's the sort of situation where you truly have one occurrence and you are allowed to – under the policy language it's a happening or series of happenings, you simply have to look to the specific fact scenario that is presented and determine whether each claim is a separate occurrence or whether all claims arising from one event are one occurrence.

[p.51] Now that's the sort of situation with the big bang liability that true catastrophies [sic] that Chalout, Mitchell and Marshall were talking about. That's the sort of situation that the subscriber policy was intended to protect against.

Now the way that Mr. Falencki, the Risk Manager at McDermott, decided to deal with that buffer layer, at least in part, was to go out and get through their off shore captive insurance company that they owned, Creole, it decided to partially insure that layer. And that's where the Creole policy comes in to the amount of 500 thousand dollars per occurrence.

I think it's important to note, your Honor, that should you agree with our analysis that the event is the exposure to asbestos in the context of this case and that each claim is a separate occurrence, that's not going to result in a situation where B&W is left without any indemnification, rather that's the situation where Creole steps in and, as to the 1979-80 injuries, they have indemnification responsibilities for up to that 500 thousand dollar limit.

Now, should a single asbestos claim truly go bad and the Plaintiff's lawyer hits a home run and gets a 2.5 million dollar verdict and only the 79-80 policy year is triggered, Creole pays 500 thousand dollars, the rest [p. 52] of the buffer layer, the 1.5 million, your Honor, essentially becomes self-insured and the subscribers then respond to the next 500 thousand dollars.

This is not a question of whether or not there is coverage, this is a question of where the indemnity responsibilities lie and it essentially boils down to whether, in our view, B&W ought to be forced to live up to the bargain that it's corporate parent risk manager struck by looking first to the buffer layer which is partially insured by Creole.

The testimony that we obtained from Marsha Dilling, who was B&W's Rule 30(b)(6) corporate representative's deposition, had to do with the history of B&W's use of asbestos, and the history and nature of the claims.

And we have produced Marsha Dilling's testimony in its entirety at Tab K of the General Appendix. Dilling's testimony clearly underscores this is not a single, monolithic business decision and it would not be appropriate to find that there is not only that business decision, the cost, but there is one business decision.

Dilling's testimony indicates that these more than 120 thousand claims arise from a number of different fact scenarios. These fact scenarios date back to at least 1884, which is apparently the earliest recorded use [p. 53] or specification of asbestos by B&W.

Dilling's testimony underscores the fact that in addition to the question your Honor was asking about the specially made boilers, that whether there was a separate contract, they were making a number of different types of boilers, everything from package boilers, which essentially would be made by B&W at the factory and shipped to the customer, installed on site, to ones that had to actually be fabricated on site.

So we are dealing with a number of different types of boilers. We are dealing with over 10,000 boilers of at least five different types on which asbestos was specified and into which asbestos-containing components were incorporated. And there were, by Miss Dilling's count, about five different generic types of asbestos-containing components that were used.

This is not a single business decision. This is not in the words of that Owens-Illinois case upon which B&W relies so heavily, one approximate, uninterrupted and continuing cause, this is a number of business decisions.

Now, I think it's important to step back even one step before that; and the case is interesting in that while parties agree on many of the requirements for triggering coverage and that sort of thing, there were several areas of disagreement. The areas of agreement [p. 54] are, as I see them, as follows:

First, the number of occurrences in this case is going to depend upon the number of events, as that term is used, in the subscriber policy.

So if there is one event, there is one occurrence. If there were –

THE COURT: You are using the world events synonymous with causative event?

MR. SALMON: That's right, your Honor. And I believe the parties are also in agreement that the term event refers to the cause.

What we disagree on is what is the cause. We believe that the marine decisions, including the ones which construe this language, look to the immediate or proximate cause rather than some remote cause. And there is an abundance of case law that supports this position.

For instance, the Pittsburgh Corning case that we have cited in our briefs, which has virtually identical language to this, it doesn't have it though with respect to all the insured operation clause at the end.

What the Pittsburgh Corning court stated is as follows. I think if I could take a minute to read it, I think it is important because B&W's exposure, like Pittsburgh Corning's exposure, was massive in the form of many thousands of claimants and also arose out of a number [p. 55] of different products, hundreds of job cites, et cetera. The Pittsburgh Corning case – and this is an unreported federal court decision out of the Eastern District of Pennsylvania, and it is contained in our General Appendix.

The court, in construing this language and rejecting the one occurrence business decision theory, stated as follows:

"Pittsburgh Corning is being sued by thousands of claimants alleging exposure to Unisbestos on hundreds of job sites, on thousands of different dates, and under a variety of conditions over a period of six years. Not everyone exposed to asbestos is affected and not all claimants were exposed under the same circumstances or to the same lot of asbestos. I hold that the cause of injuries in question is the exposure of each individual to asbestos. That exposure thus constitutes an occurrence for the purpose of determining the number of occurrences."

The court found that the cause of asbestos-related injuries is not some nebulous business decision to use or specify asbestos. What is the cause of these injuries is that at some point after the business decision, the theoretical business decision is made, the asbestos becomes friable. The Pittsburgh Corning case also points out that not everyone who's exposed to asbestos gets asbestosis or mesothelioma, not everyone [p. 56] develops a disease.

And I think that's the best response to B&W's claim that – and I believe their distortion of our position – they are, I think, claiming that we are saying that the event is the injury. The event is not the injury.

THE COURT: That was the reason for my question.

MR. SALMON: The event is the exposure.

Now in some instances nothing is going to come of the exposure and there is no problem. In other instances an asbestos-related disease is going to be contracted, and that's the happening or series of happenings.

This language must simply be viewed in the context of a specific claim, and this is the analysis that another federal court judge gave to virtually the same language in virtually the identical context on summary judgment.

And that is, I believe I indicated there were about four cases that we considered very crucial – and the Pittsburgh Corning case is the first one – grant summary judgment on multiple occurrences rejects the business decision they were – it goes without immediate or proximate cause test rather than a remote cause test on summary judgments defines multiple occurrence under this [p. 57] language.

The second legal decision is a decision that counsel for B&W talked about briefly, the Norfolk and Western Railway Company versus Accident and Casualty Insurance Company. It's a reported decision now in the federal court in the Western District in Virginia. It came out last year.

It, again, like Pittsburgh Corning, is a case which construes virtually the identical policy language that appears in the subscriber policy. It, like this case, is a case involving mass tort claims. The claims in Norfolk were not asbestos claims, rather they were thousands of noise-induced hearing loss claims.

What the insured attempted to do in that case even though there was no unifying definitional conditions or one occurrence definition, whatever you want to try to call it, they tried to argue that the generalized business decision to allow noisy machines at their many locations was a single occurrence so as to exhaust their self-assured retention.

And the trial court in that case said no. They rejected the notion that general business decision is the cause of the injury and they rejected the notion that you could aggregate many claims of these sorts, which as the claims in this case arise from a variety of circumstances, [p. 58] you simply can't say that that is one occurrence. And that again was another case that was decided on summary judgment.

The court essentially looked at the identical legal argument that was made by B&W here and said it simply defies common sense, it's not reasonable, it strains the language. And even though we generally favor granting indemnification, we are not going to take an unreasonable and contorted construction simply to create indemnity. And there is simply no reason for that rule to be applied here because there will be indemnity under our analysis of the subscriber language from the Creole policy.

Now, the third significant decision, and it also construes similar language, the definition of occurrence is the Northern Shipping versus Arkwright-Boston case. And that's out of the Third Circuit. It's a case that we also discuss in our briefs.

Same definition of occurrence. The facts had to do with the insured unloading, on several dozen occasions, shipments of fruit or some sort of cargo. The claim there on the insured's part was: Hey, this is one occurrence.

The court in that case rejected the generalized business decision of one occurrence view and said that [p. 59] there were at least 23 separate occurrences, and it did so on summary judgment construing this language.

And it's important to note that in the court's analysis, none of the parties believe that the language is ambiguous. If the court, however, should find that the language is ambiguous, this does not simply, automatically take the case in the realm of a jury trial.

And our third brief, in Footnotes 8, 9 and 10, we cited a number of decisions. Footnotes 8 and 9 had to do with all those decisions which decide summary judgment on a number of occurrences either based on ambiguities or no ambiguities. There are only a handful of cases on which this number of occurrences issue has been submitted to a jury, virtually all the cases are decided on summary judgment.

One of the few cases that was submitted to a jury having to do with number of occurrences was the fourth significant case I would like to talk about for a moment. And that is the Northbrook versus Procter and Gamble

case. This is a decision the Seventh Circuit came out with in 1991. Northbrook versus Procter and Gamble construes and interprets Ohio law, and it's one of two reported federal court decisions which construe Ohio law on the number of occurrences.

As in this case, the dispute in Northbrook was [p. 60] a dispute concerning the number of occurrences as it related to underlying coverage or a deductible.

Now what happened in Northbrook was that there was a series of many thousand toxic shock syndrome claims. The insured in Northbrooke [sic] claimed that its general business decision to develop and test and design and market and manufacture and sell and subsequently to recall Rely Tampons was a single occurrence for the purpose of determining number of deductibles.

Northbrook again flat out rejects that business decision theory of causation that would allow for the aggregation of many thousands of claims as one occurrence.

Northbrook is also significant because, as in this case, the court did not – was not construing standard form language. The same sort of standard form language that is construed in virtually every case upon which B&W relies, as was the case with B&W, McDermott, Procter and Gamble was a large sophisticated concern. They had the opportunity and ability and they took advantage of the opportunity to become co-drafters of the policy. That's a factor that simply cannot be underestimated, in our view.

The Seventh Circuit in the Northbrook case affirmed this jury verdict of multiple occurrences. Another very significant aspect of the Northbrook [p. 61] decision, your

Honor, is its severe criticism of the Owens-Illinois versus Aetna case. That was the case that counsel for B&W had this big blowup on, having to do with the unifying definitional conditions.

Now Owens-Illinois is a 1984 decision out of the District of Columbia there in federal court. It construes not anything remotely approaching the definition of occurrence in our policy. It construes standard form CGL language which is, as counsel for B&W indicated, the standard form rather than language at issue in this case, normally has that combining feature which allows aggregation of claims and also triggers coverage based upon when the injury took place, not when the cause took place.

In finding a single occurrence in Owens-Illinois, that foreign court did apply a cause analysis. It also applied the doctrine of reasonable expectations. It's a 1984 decision and two years later the intermediate Appellate Court here in Ohio held that Ohio does not follow the reasonable expectations doctrine. That being said, the vitality of Owens is simply gone and just doesn't provide any controlling precedent, and it's also based upon different language.

Another central concept that you see in these cases that B&W is relying on is what we have called the [p. 62] illusory coverage argument. This claim that hey, if you don't allow us to aggregate claims, you are essentially going to be denying us coverage, and that's what we paid our premium for.

Well, a multiple occurrence holding in this case is not going to result in an illusory coverage, there will be a

right of indemnification from the buffer layer, from Creole in this case. And also that's not to say that for the million dollar premium that McDermott and B&W paid they did not receive valuable coverage, it just so happens there was not a true catastrophe that happened during the term of the policy that could have caused over a 150 million dollars worth of loss, in which event, you know, the subscribers would have paid their 17.5 million dollar layer. It would have been exhausted and B&W would have gone up the line until it had collected all of its limits of liabilities.

It would not be defeating the purpose of this insurance contract for the court to say that we should follow the policy language in this case and find multiple occurrences.

The Morton Thiokol decision that counsel for B&W also cited is an unreported trial court decision construing a policy that's again a standard form CGL policy definition of occurrence, that does not have a [p. 63] buffer layer. It allows the aggregation of claims by virtue of the one occurrence condition and it doesn't trigger coverage, as does our policy, based upon the cause of the event.

The Morton-Thyocol decision, your Honor, was effectively overruled by a subsequent intermediate appellate court decision which says that a trial court's decisions to apply Ohio law, those policies were wrong and the law doesn't apply, effectively rendering moot the Morton Thiokol decision on which B&W relies.

B&W has also cited this Grand River case. Your Honor, we have discussed that in our briefs and I won't beat a dead horse. The Grand River case is simply not a

number of occurrence case. The issue in Grand River was simply, was there or was there not an occurrence. Again, that was standard form CGL language which provided that no coverage was provided for acts that were expected or intended.

What Grand River concerns is whether or not acts are expected or intended, it has nothing to do with number of occurrences and does not provide any discussion of the number of occurrences issue.

The Air Products case and the Stonewall versus National Gypsum case that have also been cited by B&W, and relied upon them, the standard form language definition of [p. 64] occurrence. It has the one allowance occurrence that allows the aggregation of claims, it doesn't have a buffer, simply provides no legal support for their position in this case.

Now while the parties agree that the event within the occurrence definition refers to a cause, we disagree as to what is the cause.

Now, we agree that the event refers to the case, we disagree as to what the cause is. The better reason decisions, and the only decision which have construed this language uniformly, state that you look to the immediate or proximate cause, not the remote one.

Pittsburgh Corning says that in the context of asbestos bodily injuries, the causal event is the exposure of the individual to asbestos. That's exactly the situation that we have consistently articulated in this case, your Honor. We have never asserted four different legal positions; we have not tried to confuse event with injury; and

we are always arguing that the event is the causal event, and it's the exposure.

Now there are cases out there that we have recognized that have looked to the sale or manufacture of asbestos, and that's perhaps an intermediate step, but the general principle in our view is that the causal event within the meaning of the occurrence language is the [p. 65] exposure of the individual.

The parties other area of disagreement concerns whether or not the event must take place during the term of the contract.

Now anyone who has diagramed sentences in elementary school would be hard pressed to argue you jump over all this language here and go to here, the coverage being placed to the term of the policy refers to happenings or series of happenings, it simply doesn't. And if the parties had intended that to be the case, they would have put in the contract effectively, after the heading of the coverage, the happenings or series of happenings.

You have to give consideration to the way the language is placed and given its plain meaning. We simply believe there is not any set of circumstances, other than reading the requirements, being that the causal events must take place during the period term of the contract.

Now, so far as this business decision theory of causation that's been asserted by Babcock and Wilcox as the events is concerned, we believe it's not appropriate to use a remote clause analysis. If, however, a remote cause analysis is employed, the business decision was made in

1884, or thereabouts, you know, a business decision is an end and it's not a continuing process.

[p. 66] If they want to say that the business decision is use and specification of asbestos, to be consistent you have got to say, if that's the case – and we don't believe it is – but if it is, it would have to be the use and specification of asbestos, that's the event. That took place during the term of this contract, that is 1979-80, which would mean that there would be a limited indemnity for exposure to asbestos that was used or specified in 1979-80.

Now we know that as of 1972 or thereabouts, according to Marsha Dilling, with the advent of the OSHA regulations, B&W became aware of the asbestos hazard; and it's immediate reaction was to stop, immediately stop specifying the use of asbestos in its boilers.

Dilling also testified that starting in '72 and going up through, I believe she said, the late 80's, every time B&W had the opportunity to substitute a non-asbestos containing component for an asbestos one, they attempted to do that.

Now if there was some business decision made in 1884, certainly it wasn't during the term of the policy. There is no continuing business decision; if there was, you have to say that that business decision stopped as of 1972 and a separate business decision was made to cease specifying and a separate business decision was made each [p. 67] and every time they stopped using the many different asbestos-containing components.

The argument that has been articulated by B&W essentially best fits the Minet language they get to with

the one occurrence or the unifying definitional conditions they get to aggregate under the Minet language, that corporate market planning was rejected in 79-80. And in 80-81 they not only in that language had a buffer layer, but they would have been allowed to aggregate claims due to all such exposure to substantially the same conditions as one occurrence.

They would also have been able, under the Minet language that the Risk Manager chose not to go with, they would have also been able to trigger coverage based upon when the personal injury property damage and/or advertising liabilities took place rather than when the cause took place.

While we have no disagreement with many of the general legal consents that have been discussed by B&W, we simply think that they have not relied on cases that construe this language or anything remotely approaching it. It's important to read all parts of the subscriber policy together, if at all consistently.

We believe our position has been mischaracterized on several occasions. The comments about [p. 68] us making four different arguments as to what the cause is, just one of them, I believe I talked about the attempt to create confusion in our policy, their position as to whether the event is the injury or the exposure, we talked about that. B&W is also claiming, as I understand it, that we are attempting to convert occurrence based coverage into accident based coverage because we only provide coverage for, you know, instantaneous happenings rather than things that take place over the course of many years.

We have not and we will not argue that position. All that we argue is that for there to be indemnity as a threshold matter the event must take place during the term of the contract. It doesn't matter whether it's instantaneous or takes place over a long period of time. We are not trying to make this language into something that it is not.

B&W's legal argument is perhaps most noteworthy for what it ignores. They have studiously avoided discussing the buffer layer and the intention of the parties that the buffer layer always be maintained in force. They have likewise not addressed the one occurrence condition that appears in the other part of the policy. They have not discussed the difference in the occurrence wording between the two policies.

[p. 69] They have, in large part, ignored the requirement or tried to dance around the requirement of the event needing to take place during the term of the policy. We believe B&W's argument is strained and unreasonable and should not be followed under the general principle that you try to create indemnity under insurance contracts.

The general principle in interpreting an insurance contract is that you look at the policy as a whole and try to enforce the parties' intent. The parties simply did not contemplate coverage for this sort of risk. The business decision theory of causation is not the cause of the injuries, the exposure of the individual to asbestos is.

There are no material fact disputes in this case. The fact that experts might not agree as to how the policy

should be construed does to present a material fact dispute. They know nothing about the negotiations, they were not involved in the underlying negotiations. And that's basically a non-issue, in our view, your Honor.

The question in this case boils down to which layer should pay. We believe that under the clear language of the subscriber policy, which manifests the parties' intent, responsibilities for the injuries that take place in 79-80 properly rests with the buffer layer, [p. 70] which is the first 500 thousand dollars insured by Creole, simply for the reason that each claim is a separate occurrence and the buffer layer provides two million dollars per occurrence.

And a ruling in that manner is going to be telling Babcock and Wilcox, your Honor, that Creole should be paying up to 500 thousand dollars for each and every one of these claimants.

For these reasons, your Honor, we respectfully request that the court deny B&W's one occurrence business decision theory. We respectfully pray that your Honor find that the causal event is the immediate or proximate cause of the injuries, which is exposure, and that each and every asbestos bodily injury claim is a separate occurrence.

THE COURT: Thank you very much, sir.

MR. SALMON: Thank you, your Honor.

THE COURT: Anyone else on this side?

MR. CLEARY: Good morning, your Honor, Bill Cleary for the London market. At the outset, I would like

to thank your Honor for postponing the trial in this matter. I thank you, my bride thanks you.

THE COURT: As I told you. I did not have that much courage.

MR. CLEARY: Unfortunately there is a judge in [p. 71] Florida that has quite a more than you in that regard.

I would like to address a few points Mr. Hatchadorian made. I'll go through them as I go through my notes. And my argument is going to be a tad disjointed, but the first point I would like to make is, while it may not be a [sic] of great legal significance, the – or it shouldn't be of great legal significance – you read the number of occurrence cases. I think it's of tremendous practical importance that when you read them in every situation it was a case of all or nothing at all for the insured. The court ruled against them, they didn't have any coverage whatsoever.

There are cases where there were years full of deductibles which would apply or a number of cases in a single year where a deductible would apply. That's not the case here.

One way or the other, B&W has insurance coverage. Either Creole pays it or we pay it, depending on your decision. The fact of the matter is, my clients in particular are paying a tremendous amount of money in this case. They have paid well over 200 million dollars to cover these claims. They have budgeted a hundred million dollars a year into the foreseeable future. That's just the first point I would like to make.

Going through and addressing some of the points [p. 72] Mr. Hatchadorian made. He made reference to the history of the occurrence language. One of the reasons B&W points to the history time and time again is because they don't like the occurrence language we have here. They like the general CGL policy which has a history.

Mr. Hatchadorian is correct that this language was developed in the London market and I think it indicates the irrelevance of it because we have tried to trace it back, we don't know who drafted it in the first instance. The best we could do, we found the broker in the 1940 who said, I took the language somewhere else, stuck it in the policy form. So the original intent to use the constitutional term is lost.

What is important is not where it came from in the first instance but how it got into the policy. And there is no debate here that the person who brought this language to the table is Adams and Porter on behalf of McDermott and B&W.

Also Mr. Hatchadorian made reference to accident versus occurrence policies, that again goes to the history. And technically its irrelevant what you look to is the policy language, they want to take occurrence and turn it into a generic term; and while that's correct in some instances, you have to look to the language. It's not a term that has the same meaning [p. 73] everywhere. We looked to the happening that requires that event during the policy period.

The next point I would like to make – if I could find it – during Mr. Hatchadorian's argument and the court's questions, I sensed you may have the same problem with

the continuous business decision theory as I have. When I make a decision, I make it, it's done.

For instance, when the court rules on this matter it will render a decision. That decision is definable in time and place, it's done. You may write a written decision which becomes precedent and stays in force, but the decision was made at a particular point in time. At some time you may change your mind, write another decision, overrule or be overruled by another court, but that does not make it one continuous process. The decision is made at one point. While its effects may go on forever, the decision is made at that point. And that's simply a point I would like to make.

The next one is that –

THE COURT: The thing I was trying to say was this – and perhaps you could speak to that. In this instance, there was an exposure and an injury, at least hypothetically, which arose from a contractual decision to use asbestos. Because it was a matter of specification, I assume, on the plans for the ship or the units on which it [p. 74] was used; is that correct?

MR. CLEARY: I believe that's what they were espousing, your Honor.

THE COURT: Is that your view?

MR. CLEARY: Well my view, your Honor, is they made a decision in 1884 to use asbestos, no doubt, because it was the best available material and it worked the best.

THE COURT: But they used it generically. They said generically we are going to use asbestos. But every

time they were faced with a contractual obligation to supply a boiler unit, let's say for a ship, because I don't know that much more about it, weren't they making a decision as to the use then?

MR. CLEARY: I would agree with that, your Honor.

THE COURT: And isn't that decision a different one than the one before?

MR. CLEARY: I agree wholeheartedly with that. And I think it points up –

THE COURT: Excuse me. Is that not a continuing decision from the standpoint of their building preparations to the use of their boilers? I think that's what they are saying, it's a continuing use.

MR. CLEARY: It's a continuing use, your Honor, but it is a decision made every time they make a boiler.

[p. 75] THE COURT: That's my question.

MR. CLEARY: I have a hard time explaining it because I quite frankly don't understand it. If they made a decision to use asbestos in 1884, that decision was made, they make a boiler; every time they specified asbestos.

And in 1982 they think, asbestos is a bad thing, we are not going to suggest it as a insulator any more, we are going to phase it out. Certainly that is a decision. And from that time on they made a decision every time to leave asbestos insulation out and specify as many asbestos components as it could.

THE COURT: It's an integral part of the manner in which they manufacture.

MR. CLEARY: Your Honor, if we want to take it to that extent, you can go back to the first decision to manufacture boilers would be the cause.

THE COURT: That's precisely why I'm asking the question.

MR. CLEARY: If you go that far back, why not go all the way and say every liability GM has was based on their decision to manufacture cars. I mean, if it's an integral part of the product and it can't be taken out, then the decision to make the boilers in the first instance is the event.

[p. 76] And I really don't see how that works in the products liability field.

The next point I would like to address is the exposure equal injury theory that they have pinned on us.

THE COURT: We are under a secrecy order, it's okay, you can state it.

MR. CLEARY: Getting back to the expose equals injury, I think Mr. Hatchadorian's example of the chicken pox is a good one. He argued a little kid going to school exposed to chicken pox in his class is injured at that point.

I disagree. There were 50 kids in that class, all exposed at the same time. Maybe 10 of them get chicken pox, there is no injury to the others. They may have a chicken pox germ, and as a matter of fact that may have

built an immunity and are better off than in the first place.

It also goes back to how our policy would work. If the exposure to chicken pox occurs during our policy period, then even if the chicken pox develops after the policy expires, that injury is covered.

So it's not the fact that it has to be the injury and the exposure have to happen simultaneously, it can certainly happen separated in time and space.

The other – excuse me, your Honor, I lost my [p. 77] train of thought.

But – I think that's about the extent of what I have to say at this point. Thank you, your Honor, for your time.

THE COURT: Gentleman, are there any of you who are going to speak on this side?

MR. SALMON: Your Honor, maybe I could just give you what we have got here for the court's later use.

THE COURT: I appreciate that.

MR. SALMON: Thank you.

MR. STARLING: Judge, if I might just make one comment.

THE COURT: I would like to ask you a favor. Inasmuch as the court reporter is going to be working through the noon hour on the next case, can we take a break for him?

MR. STARLING: Certainly, your Honor.

(Brief recess.)

MR. STARLING: Your Honor, Gordon Starling for Creole Insurance Company, Limited.

Although there is a lot we disagree with the subscribers on, we are going to limit ourselves to the Creole issue. The subscribers keep arguing without any basis there will be insurance for B&W if this is found to be a case of multiple occurrences.

[p. 78] Their argument has absolutely no basis. The coverage for B&W is mentioned in the Creole Insurance in two places. The language is essentially intended with both tongs and its says:

"Sum insured: Two million dollars per occurrence above existing primary layers for J. Ray McDermott Co, Inc. and Babcock and Wilcox, except Workers Compensation and General Liability coverages for Babcock and Wilcox where a limit of $500,000 per occurrence excess of two million dollars per occurrence applies."

The provision couldn't be any more specific, any more on point. Creole doesn't pay a claim based upon general liability of Babcock and Wilcox, which is what we are arguing about here, unless an underlying amount of two million dollars per occurrence takes place.

There has never been any of these – like everyone agrees to – there has never been a claim against B&W that has exceeded around $10,000. They have never come close to two million dollars. If they found to be multiple occurrences, B&W is absolutely without insurance.

THE COURT: Thank you, sir.

MR. MOSELEY: Your Honor, Rockne Mosely on behalf of McDermott. And I would like to say a few remarks as well.

What I've heard argued here today from the [p. 79] insurers is a great deal extrinsic evidence which sounds to me like an appeal to go to a jury, to have a jury decide this matter. We have had a great deal of testimony of intent without referring to the policy. I think quite clearly if you look at what the insurers are saying, if the parties intended to eliminate all of those claims, they would put two million dollars in any one claim.

And that was clearly spelled out, what they are out. What they are now trying to argue, that is not what they said, there is not a mention of claim anywhere in here. If they wished there would be no aggregation of claims, as they argued, you would just put in there any one claim.

There is nothing about failure, that you can't aggregate claims. The aggregate limits here refers to occurrences, and there has been no attempt to aggregate occurrences. There has been another attempt to make them drop down. If that is their argument, they have built in there own ambiguities and asked for a jury trial, which I think is what they have asked for.

I would also like to point out to the court, that both – in fact, all of the defendants in their answers to this court, have said that they admit and affirmatively allege that the claim of each and every separate asbestos claimant is a separate occurrence as [p. 80] defined in the policy. That means the number of occurrences is judged by the number of injuries. That is the effect test; you may call it a cause test, you may call it an immediate cause test, but

that is simply a show to make it an effect test. Because the number of claims determines the number of occurrences in either case.

If you asked the other side whether using the effect test or using their immediate cause test, there would be a difference in the number of occurrences, I think they would have to truthfully tell you that there is no difference, that the number is the same.

Every one of the corporate witnesses of the defendants has gotten up and said there is nothing in the occurrence language that says that you may not have more than one claim arise out of an occurrence. That's the nature of the combining issue; all of their 30(b)(6) representatives agree to that.

There is nothing in the term occurrence that I see that writes in the word sudden into that clause before events or accidental or big bang or catastrophe. It says one event. It says nothing that the event has to take place exclusively and only during the term of the policy. They cannot – it can't be an event that spans a number of years. In fact, it goes on and said with respect to all the assureds operations which is not limited in any way.

[p. 81] In addition to that, if we look at timing, since there has been a great deal of discussion of timing, the exposure theory, as contemplated by the defendants, clearly also goes over time. An exposure in the work place can last 30, 40 years. So their own event can go through a long, long period of time.

If we try to break down and say it cannot be or we must break it down into individual decisions, then why

should we not take and break down the exposure period to the individual breaths that a person takes. The same logic would apply in their theory, and therefore every breath an individual takes, every time a claimant takes a breath it becomes an occurrence.

That's what their theory is and what they have done to urge you they would do. There is nothing inconsistent that events can take place over a long period of time, in both theories that they put forward.

In addition to that, I think it's important because the court has pointed out that the mainstream theories, with regards to the cause test, focus on the one occurrence in the business decision such as we have urged, and then whether or not you can identify a point of sale or a point of distribution, or something like that as a cause.

Neither of the parties here has urged the [p. 82] points of sale as a cause. And there is reason for that, and that is because in the business that B&W is in, you really can't identify the points of sale or contracting as the entire issue with regard to asbestos in the boilers that B&W makes. You don't put them on a box car and ship them out and never see them again.

B&W engages not only in designing them, manufacturing them, installing them, but also the support activities; repairs, replacement parts, modifications, repairs of all kinds that last throughout the entire useful life of a boiler.

When B&W enters into these arrangements with its buyers, these people expect support as long as that boiler is useful, and it stays and goes with that boiler. And so

there is no point in time that you can focus on that truly identifies a decision at that point for that boiler.

The only logical and consistent way of looking overall is the whole picture of looking at the decision to utilize and a continuing decision to utilize asbestos in boilers, including the repair and the support and service support activities that go along with it.

It is interesting also that in all the discussion saying this is B&W language or Adams and Porter language, that the other side has failed to point out this [p. 83] is truly standard language and it is language used by London, as Mr. Clearly [sic] pointed out. But also in the Northern Shipping case, which is the case that involved the Merchant Marine Office and Arkwright Boston, the same language was there as well. And that policy was issued in 1978, a year before this year. This was clearly language used by Arkwright on a number of times.

In addition to that, they used Northern Shipping to support their theory of exposure. Northern Shipping does not support that. Arkwright had 97 claims and they decided each unloading of a new ship coming in was an occurrence, and therefore even breaking it down to the component that they could see. So there were 23 occurrences.

So it does not support their theory of exposure, it rejects it because Arkwright argued at that time there were 97 different occurrences, 97 different claims. It rejected that specific claim and went to a cause theory. It rejected that effect test, and it went to the cause theory. And it went to the cause theory because it could identify

it. And that was the cause that each ship – there were 23 different ships.

We also have to look at Norfolk Railroad because they have, again, your Honor, had that exposure theory. Nowhere in Norfolk Railroad does the court say [p. 84] that we accept each individual claim as an occurrence. It never says that. It simply says we reject the idea that all hearing loss across the entire railroad is one event.

And that would be the same as if B&W came in here today and said, judge, we think that all broken arms that we have are one occurrence. And we haven't done that. We have come in today and identified the decision-making process, we have identified the type of injuries. We have identified the type of product that causes it, that is clearly distinguishable from Norfolk Railroad.

And more than that, Norfolk Railroad was decided on the basis that was occupational decisions and mentioned it only as an afterthought because it might be useful on the occurrence theory, but he did not accept their theory. And it is absolutely incorrect to say it supports their theory. It supports a different theory and a more mainstream one.

Northbrook versus Procter and Gamble was a jury decision, and we have no guidance as to what the jury thought or what extrinsic evidence they were given, extrinsic evidence that they look at in the occurrence decision here into premiums. Their idea of comparing premiums is interesting because they have had no expert discuss that or discuss the other terms and conditions to [p. 85] make that an adequate type of comparison.

In fact, if they looked at this, the reason they don't have it here – or I don't know why they don't have it here, is the policies for B&W urge for those periods are for negligible amounts of money, under hundred thousand dollars. They're very small.

Excess insurance for B&W was minuscule [sic] compared to what it was for McDermott and probably had no effect whatsoever on really the premiums you see in the Adams and Porter policies. If you would look at them fairly, that's what you would see. You would also see this standard language that I don't see in the Minet policy. Here is also standard language from the London Market umbrella in 1971. This is also standard language from the other London Market. In fact, the underwriter for London Market said he didn't see any differences between the two, that they were the same for him.

So coming in on this distinction of saying the premium somehow makes this as not an adequate one, I don't think it would be admissible because it's like junk science, and that they have no expert that has ever done that kind of a calculation.

It is also important to say that Pittsburgh-Coring, which they have cited, that that case maximized coverage. It also is fair to say that an [p. 86] insurance company in that case urged the exact same theory that we did, that we have here today. An insurance company came in and urged it and they now say that it's completely ludicrous and unacceptable to make our argument.

One has to admit before this court that both sides can intellectually and honestly argue our positions as being

different positions, that we are at least reasonable because different courts around the country have accepted them. There is more than one way of reading this, that is clear, but what our job here today is to look at is what does Ohio law say about it? And does Ohio law read it two different ways?

And the answer to that is no. Ohio law is very clear on the subject and Grand River Lime is very clear that it said that there was one occurrence and it spanned over seven years and that the event is not limited in time. And that Morton Thiokol specifically said that the decision making is the occurrence, it is the event, it is the cause that we are dealing with here. And that Owens-Illinois continues to be good law because it discusses the cause test. And the cause test is the same whether you look at their definition or our definition, that remains the same.

And so that the court must look to Ohio law for [p. 87] is guidance, and Ohio law completely indicates that, in fact, that this is one continuous decision; that it is in fact one event, and that all asbestos related claims arise out of one occurrence.

Thank you, your Honor.

MR. HATCHADORIAN: Your Honor, if it please the court, I just have three brief points that I would like to make in rebuttal, and then we'll be finished.

The first is – I want to use the cart, if I may.

The defendants in their presentation made the point the parties didn't contemplate the type of risk that resulted in this case. And I want to point out to the court that the definition of personal injury in this particular

case, from the policy reference to sickness as well as disease, that's the definition under personal injury. Personal injury means bodily injury resulting from sickness and disease, which we feel is appropriate to this case. We think that that definition is important.

The second point is, that from our presentation we asked the court to rule based on the policy itself. We don't feel it's proper for he court to consider extrinsic evidence. If the court feels that it does have to resort to extrinsic evidence, then we believe the Ohio law requires the jury decide the policy construction issues.

[p. 88] And the final point is, in our brief we talk about events in terms of an underlying act committed by the insured. And we think that it's important and have tried to emphasize in our brief that Babcock and Wilcox's asbestos liabilities results from one underlying act, which is the decision we talked about, and that it was a continuing, ongoing decision. And because of this underlying act took place in part during the 1979-80 year, that's why we believe that B&Ws liability should be viewed as one occurrence.

Thank you.

THE COURT: Thank you. Thank you all. It's a very appropriate articulation of your positions. I really appreciate it.

You don't get the last word.

MR. CLEARY: Well, your Honor, there is a point that Creole made that we need an opportunity to address.

MR. MOSELEY: It's not addressed in briefs.

MR. SALMON: I can do it in about 30 seconds, your Honor.

THE COURT: Well, if it's that important.

MR. SALMON: Thank you. Creole had made the point if the court rules our way they shouldn't have coverage. They already have paid the first $500,000, and the reason they have is that their policy – this is in [p. 89] the record as Exhibit 29, on page 5 – provides what's called drop down coverage. Which means that when the coverage underneath the Creole policy – that's the Travelers policy – is exhausted that the Creole policy says – I'm quoting:

"In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder," which is exactly what we have in this contract, the Creole contract.

Skipping down to Section 2:

"In the event of exhaustion continue in force as underlying insurance."

And that's why exactly why they stepped in after the primary coverage was gone. So that coverage is still there.

THE COURT: Suppose they did not step in, suppose there is no coverage, what does that fact alone have to do with the interpretation of this policy?

MR. SALMON: The fact that there is no coverage? Are you saying if there had not been a coverage in the buffer layer?

THE COURT: Suppose he's right.

MR. SALMON: First of all, he is not. And yes –

[p. 90] THE COURT: Assuming he is, just assuming he is.

MR. SALMON: It depends, your Honor, on the basis of the decision. If the court were to find he's right, the court would essentially have to find there is no drop down coverage under the Creole policy, and that's the only way that the court could come to that conclusion. And the Creole policy clearly does provide drop down coverage.

THE COURT: Okay.

MR. SALMON: Thank you.

THE COURT: Mr. Cleary, anything you wanted to add along that line?

MR. CLEARY: No, that was the point I wanted to comment on.

THE COURT: Thank you all very much, again.

Are any of you ordering a record on this? I hate to even ask you.

MR. SALMON: Your Honor, I think it would be good for the parties to agree to split a record and provide a copy to the court.

- - -

(Hearing Concluded)

[p. 91] CERTIFICATE

I, Richard G. DelMonico, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

/s/ Richard G. DelMonico
Richard G. DelMonico,
Official Court Reporter
U.S. District Court
425 U.S. Courthouse
Two South Main Street
Akron, Ohio 44308
(216) 535-2280

PARTIAL COMPILATION OF SUBSCRIBERS' DISTRICT COURT ARGUMENT REGARDING TRIGGER OF COVERAGE DEFECT UNDER B&W'S NUMBER OF OCCURRENCES ARGUMENT

R. 216 – Consolidated Position Statements and Issues and Stipulated Facts November 16, 1992

Pg. 6 "Defendant Subscribers' Statement of the Issues

The Defendant Subscribers submit that the contested issues of fact and law are:

1. Has B&W sustained its burden of proving that it is entitled to coverage under the subscriber policy for asbestos-related bodily injury product liability claims in light of the following coverage issues:

* * *

b. Did an event(s), as required by the subscriber policy's definition of occurrence, take place during the term of the subscriber policy?"

(Joint Appendix at p.366)

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R. 271 – Subscribers' Opening Brief on Cross-Motions January 25, 1993

Pg. 22 "The final requirement of the subscriber policy's definition of "occurrence" is that the one "event" which gives rise to or causes the "happening", e.g. the injury, must "tak[e] place during the term of this contract". This clear and unambiguous additional third requirement of the subscriber policy differs

from the "standard form" definition of "occurrence" that has been construed in many of the "number of occurrences" cases. Thus, if B&W is to have any coverage at all for its asbestos liabilities under the subscriber policy, it bears the burden of establishing that an "event" giving rise to a happening or series of happenings has taken place during the term of the contract. Since B&W's use of asbestos commenced over 100 years ago, it can hardly be characterized as an event taking place during the term of the contract."

(Joint Appendix at p.617)

R. 292 Subscribers' Second Brief on Cross-Motions March 5, 1993

Pg. 2 "Moreover, the legal analysis in B&W's opening brief wholly ignores the third of the three elements of the subscriber policy's definition of occurrence – the requirement that the event causing the injury "tak[e] place during the term of this contract."

(Joint Appendix at p.1661)

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Pg. 9-10 "In order to recover under the subscriber policy, B&W bears the burden of proving that all underlying layers, including $2 million non-aggregate "buffer layer", have been exhausted and thereafter, proving the three elements of the subscriber policy's definition of "occurrence":

* * *

3. The event must "tak[e] place during the term of this contract", e.g. April 1, 1979 to April 1, 1980.

* * *

The parties disagree as to what is the relevant causal 'event'."

(Joint Appendix at p.1668-69)

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Pg. 12 "B&W's opening brief wholly fails to address the third element of the subscriber policy's definition of "occurrence" – the requirement that the "event" (e.g. the cause of the injury) "tak[e] place" during the April 1, 1979 and April 1, 1980 policy period. The standard CGL policies at issue in many of these cases relied upon by B&W, such as ***Owens-Illinois*** . . . included "one occurrence" conditions and did not require the insured to prove this third element. Rather than requiring that the cause of the injury take place during the term of the policy, as does the subscriber policy, the policies interpreted in B&W's legal authority required that the result, e.g. the injury itself, take place during its term."

(Joint Appendix at p.1671)

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Pg. 13-14 "It is undisputed that B&W's business decision to manufacture boilers with asbestos-containing components and to specify asbestos as an insulator dates back over 100 years; it did not "tak[e] place" during the 1979-80 policy period. Thus, B&W's argument that its business decision to manufacture boilers with asbestos is the relevant

"event" would not invoke coverage under the subscriber policy.

Nor should the Court adopt B&W's oblique argument that its "continuing" business decision to use asbestos during the policy period is the relevant "event" for the purpose of determining what is the occurrence or how many occurrences are presented. Since B&W was well aware of the hazards of asbestos in 1979, as reflected in its decision in 1972 to limit the specification of asbestos as an insulator and to limit its use of asbestos-containing components in its boilers. B&W's "ongoing" business decision to use asbestos in 1979-80 is not a fortuitous, insurable event."

(Joint Appendix at p.1672-73)

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Pg. 14 "If the 'continuing' business decision theory of the 'event' is followed to its logical conclusion, B&W's claim for coverage under the subscriber policy would be limited to injuries that arise out of or are due to business decisions made in 1979-80, e.g. those limited portions of claimants' bodily injuries that arise from or are due to their exposure to asbestos in and around boilers manufactured by B&W from April 1, 1979 to April 1, 1980."

(Joint Appendix at p.1673)

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Pg. 14 Footnote 10

"B&W does not make out a prima facie case of coverage, as it claims, by showing that "the asbestos-related claims involve personal

injuries, *which are alleged* to have occurred in part or in whole, during the policy period, April 1, 1979 to April 1, 1980." B&W's Opening Brief, n.4 (emphasis supplied). Rather, B&W must *prove* that the injury or series of injuries for which it seeks coverage from subscribers *in fact* arose out of or were due to *an event that took place during the policy period.*"

(Joint Appendix at p.1673)

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Pg. 14-15 "The plain language of the subscriber policy does not permit B&W to aggregate 125 years of business decisions to manufacture asbestos-containing products as a single 'event' ' that 'tak[es] place' during the 1979-80 policy period."

(Joint Appendix at p.1673-74)

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Pg. 15 "The many asbestos bodily injury claims do not arise out of and are not due to one 'event' and certainly do not all arise out of an event that took place during the term of the 1979-80 policy period."

(Joint Appendix at p.1674)

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R. 303 – Subscribers' Third Brief on Cross-Motions March 12, 1993

Pg. 9 "B&W's legal argument regarding the relevant causative 'event' is strained and unreasonable. Its decisions to specify the use of asbestos insulation and to place a variety of different types of asbestos-containing boilers into the stream of commerce commencing in

the mid-1800s and to gradually discontinue the use and specification of asbestos starting in 1972 is not 'one event' and moreover, did not 'tak[e] place' during the term of the subscriber policy in 1979-80. Therefore, B&W has failed to sustain its burden of proof."

(Joint Appendix at p.1716)

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Pg. 9-10 "B&W carries the burden of showing that the asbestos losses for which it seeks coverage arise out of:

3. The event giving rise to the injury or series of injuries has "tak[en] place during the term of this contract", *i.e.*, April 1, 1979 to April 1, 1980."

(Joint Appendix at p.1716-17)

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Pg. 10 "It makes not attempt to show how this so-called 'event' gave rise to the claims for which it seeks recovery under the policy. Just as significantly, B&W makes no attempt to show how this so-called 'event' took place during the term of the contract.

* * *

B&W apparently would have the Court believe that its 'business decision' to place into the stream of commerce more than 10,000 boilers of various types and sizes over the course of more than a century was a singular, monolithic, and static one. B&W does not explain how one decision could encompass over one hundred years. In fact, a decision, as commonly understood, is not an

ongoing process, but instead is the end point of a 'decision making' process, a point that is fixed in time and place."

(Joint Appendix at p.1717)

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Pg. 10 Footnote 11

"It is important to note that none of the cases which held that the underlying act was the insured's decision to market or manufacture a product which causes injury dealt with an occurrence definition which required that the "event", i.e., the cause, take place during the term of the contract. Instead, the policies interpreted in these cases required that the result, i.e. the injury, take place during the policy period. See discussion in Section III, *infra*."

(Joint Appendix at p.1717)

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Pg. 11-12 "If, in fact, B&W's decision to place asbestos-containing products in the stream of commerce is, 'one event' under the policy, then that decision was reached, by B&W's own admission, in the mid-19th century, and does not meet the clear and unambiguous requirement of the subscriber policy that the event "tak[e] place" during the term of the policy. B&W has failed to establish what, if any, causative 'business decision' it made during the term of the policy. Even if B&W could point to a decision during the term of the policy, any coverage under the policy would be limited to injuries arising out of or due to that

decision. Thus, subscribers could be held liable only for injuries arising from boilers constructed during the 1979-80 policy period. B&W has not demonstrated how, if at all, the claims for which it seeks coverage arose from any decision it made during the policy period. Moreover, any decisions made after its admitted knowledge of the hazards of asbestos in 1972 were not fortuitous and insurable events."

(Joint Appendix at p.1718-19)

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Pg. 12 "Further, looking to each claimant's exposure as the causative event will, under the proper circumstances, meet the requirement that the event 'tak[e] place' during the policy period."

(Joint Appendix at p.1719)

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Pg. 13 "Under B&W's theory, it would have no coverage for bodily injury claims if the boiler had been manufactured before 1979 since its view of the event – the business decision to use or specify asbestos – did not take place during the policy period."

(Joint Appendix at p.1720)

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Pg. 13 Footnote 13

"As should be quite clear to the Court at this point, subscribers do not find B&W's position reasonable. If B&W's position was simply that more than one claim can arise from a single occurrence then there would be no

dispute. However, the crux of B&W's position is that a business decision made 150 years ago can be considered an event during the term of the subscriber policy. Defendants submit that such a position is unreasonable on its face."

(Joint Appendix at p.1720)

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Pg. 14 "In short, B&W's position is unreasonable. Its asbestos liability does not arise out of one event, let alone one event that took place during the term of the policy."

(Joint Appendix at p.1721)

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Pg. 17 "The policies interpreted in B&W's legal authority do not require that the causative event 'tak[e] place' during the term of the policy, as does the subscriber policy. Rather, they require that the injurious result take place during the policy period. Accordingly, the one occurrence holdings adopted in those decisions would result in limited coverage for B&W under the subscriber policy, at best. No reported Ohio case adopts a one occurrence argument.

(Joint Appendix at p.1721)

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Pg. 19 "Indeed, under the occurrence definition in the subscriber policy, the timing of the injury is unimportant, and arguably can occur outside the policy period. However, the language clearly requires that the causative event must take place 'during the term of this contract.' "

(Joint Appendix at p.1726)

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

No. 95-706

In The

Supreme Court of the United States

October Term, 1995

THE BABCOCK & WILCOX COMPANY, et al.,

Petitioners,

v.

ARKWRIGHT-BOSTON MANUFACTURING MUTUAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN INTERNATIONAL MARINE AGENCY; ALLIANZ INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; CARYL VAUGHN GIBBS, INDIVIDUALLY AND ON BEHALF OF CERTAIN UNDERWRITERS OF LLOYDS OF LONDON; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.; INSURANCE COMPANY OF NORTH AMERICA (UK) LTD.; AND C.A. PARR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINDER OF RESPONDENT INSURANCE COMPANY OF NORTH AMERICA IN RESPONDENTS' BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

Respondent Insurance Company of North America joins in the Restated Questions Presented incorporated in the Brief in Opposition of Respondents Arkwright-Boston Manufacturing Mutual Insurance Company, St. Paul Mercury Insurance Company, American Home Assurance Company, American International Marine Agency, Allianz Insurance Company and the London Market Insurers (hereinafter "Respondents' Brief in Opposition").

PARTIES TO THE PROCEEDING AND AFFILIATIONS

Respondent Insurance Company of North America is a wholly owned subsidiary of INA Financial Corporation, which is a wholly owned subsidiary of INA Corporation, whose ultimate holding company is CIGNA Corporation, a publicly owned corporation.

PROCEDURAL RULE INVOLVED

Respondent Insurance Company of North America joins in the statement of the Procedural Rule Involved incorporated in the Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Respondent Insurance Company of North America joins in the Statement of the Case incorporated in the Respondents' Brief in Opposition to the extent that the Respondents argue that the district court and circuit court correctly ruled that: (1) the subscriber policy definition of the term "occurrence" is clear and unambiguous; (2) the plain meaning of the subscriber policy definition of "occurrence" is that the "event" must occur during the policy period; (3) petitioner-Babcock failed to meet its burden of establishing that the claims for which it sought coverage were for injuries which arose from a common causative event which occurred during the policy period; and (4) the issue of what must take place during the policy period in order to invoke the Respondents' duty of indemnity, the so-called "trigger of coverage" issue, was clearly addressed in the Respondents' summary judgment briefs and during the extensive oral argument on the summary judgment motions before the district court.

REASONS FOR DENYING THE PETITION

Respondent Insurance Company of North America joins in the Reasons for Denying the Petition incorporated in the Respondents' Brief in Opposition.

CONCLUSION

For the reasons set forth in the Respondents' Brief in Opposition, Respondent Insurance Company of North America respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: January 8, 1996